TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 65.

A. L. JORDE, W. A. DAGGS, E. E. DAGGS, AND A. J. DAGGS, APPELLANTS,

vs.

JAMES WILSON.

APPEAL FROM THE SUPREME COURT OF THE [illegible] ALABAMA.

(17,420.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 306.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, AND A. J. DAGGS
APPELLANTS,

vs.

JAMES WILSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. JOHNS, and A. J. Daggs, Defendants.

Complaint. Filed June 22nd, 1895, at 1.30 p. m.

The complaint of the plaintiff, who appears herein by Thomas Armstrong, Jr., his attorney, respectfully shows to the court and alleges that the plaintiff, James Wilson, is a resident of the town of Palatine, in the county of Cook, State of Illinois; that the defendant A. L. Johns resides or is alleged to reside at the city of Chicago, in the State of Illinois, and said R. E. Daggs, W. A. Daggs, and A. J. Daggs are residents of and reside in the county of Maricopa, in the Territory of Arizona.

That heretofore, to wit, on the 24th day of April, 1893, at the city of Phœnix, in the Territory of Arizona, one John S. Armstrong did make, execute, and for value deliver to this plaintiff his two certain promissory notes, which said notes are in words and figures as follows, to wit:

2 No. 1. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the 24th day of April, A. D. 1894, without grace, for value received, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred fifty dollars in United States gold coin, with interest thereon, at the rate of eight per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00. (Signed) JOHN S. ARMSTRONG.

No. 2. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the 24th day of April, A. D. 1895, without grace, for value received, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred fifty dollars in United States gold coin, with interest thereon, at the rate of eight per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00. (Signed) JOHN S. ARMSTRONG.

That at the time and on the date of the making of said notes aforesaid and for the purpose of securing the payment of the same, with interest, as mentioned therein, said John S. Armstrong made, executed, and delivered to this plaintiff a mortgage, wherein and whereby the said John S. Armstrong bargained, sold, and conveyed to this plaintiff the following-described real estate, situated in the county of Maricopa and Territory of Arizona, namely:

3 The northeast quarter (¼) of section numbered twenty-one (21), township one (1) north of range four (4) east of the Gila and Salt River base and meridian, county of Maricopa, Terri-

tory of Arizona, except one strip of land off the east side of said quarter (¼) section thirty feet (30) in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said railroad company for right of way purposes, except all of that portion of said quarter (¼) which has been heretofore known as Farmers' addition to the town of Tempe, including herein, however, lots 1, 8, and 9, in block 1, and lot 5, block 2, of said Farmers' addition; and excepting forty acres (40) of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at the point of said quarter (¼) section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty (80) rods, thence north eighty (80) rods, thence east eighty (80) rods, thence south eighty rods along the center of the street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter (¼) section belonging to Edward A. Murphy, and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred forty-two and one-half feet (242½ feet) west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred fifteen feet (115) to a post, thence west two hundred and thirty-six feet (236) to a post, thence north one hundred and fifteen feet (115) to the center of said Eighth street, thence
4 along the center of said Eighth street two hundred and thirty-six feet (236) to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone, and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), running thence west along the south boundary line of Eighth street six hundred twenty-nine & 4-tenths feet (629.4) to a point, being the northeast corner of the land hereby excepted; thence south one hundred forty-two feet (142), thence west one hundred thirty-seven and three-tenths feet (137.3), thence north one hundred forty-two feet (142), thence east one hundred thirty-seven and three-tenths feet (137.3) to the northeast corner of the land hereby excepted.

Also *pro rata* of share number (66) sixty-six in the Tempe irrigation canal and water represented thereby; also a *pro rata* of share No. two in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigating canal.

And such conveyance was conditioned that if said John S. Armstrong, his heirs, executors, or administrators, should pay or cause to be paid to this plaintiff, his heirs, executors, administrators, or assigns, the two promissory notes above set forth, with interest thereon as in said notes provided, and also pay annually the
5 taxes assessed on said premises and keep the buildings thereon insured for the benefit of this plaintiff, then said instrument and conveyance should be void.

And it was further stipulated and agreed in and by said mort-

gage that if the interest on said promissory notes or the principal thereof should not be punctually paid when the same should become due, as in said promissory notes mentioned, or should default be made in any of the conditions of said mortgage, then and in such case the whole principal sum of said notes and the interest thereon should be deemed and taken to be wholly due and payable and proceedings forthwith had by this plaintiff, his heirs, executors, or assigns, for the recovery of the principal sum of said notes, with interest thereon, by suit on said notes or by foreclosure of said mortgage; that in case any suit or other proceedings were had for the recovery of the said principal sum and interest there should be included in the judgment that might be recovered attorney's fees not exceeding ten per cent. upon the amount found due the plaintiff on said notes and mortgage, or in case of settlement after suit brought, but before judgment is rendered, then ten per cent. of the amount found due at the time of settlement as well as all payments that this plaintiff might be obliged to make for his security or on account of any taxes, charges, incumbrances, or assessment whatsoever on said premises legally laid or made thereon.

That said notes were given and said mortgage executed and delivered for the purpose of paying and as part payment of the purchase-money of said premises above described; that said
6 mortgage was duly acknowledged and certified so as to be entitled to record and was on the first day of May, 1893, duly recorded in the office of the county recorder for Maricopa county, Arizona Territory, in Book — of Mortgages, on page — to — thereof, inclusive.

The plaintiff further shows to the court and alleges that the said John S. Armstrong above named afterward and on the eighteenth day of December, 1893, sold and conveyed the land and premises above described and in said mortgage described to one Robert E. Daggs, by deed of conveyance in writing made and executed by said John S. Armstrong on said 18th day of December, 1893, and said defendant, Robert E. Daggs, accepted said deed of conveyance and therein and thereby agreed and bound himself, his heirs, executors, administrators, and assigns, to pay or cause to be paid to this plaintiff the aforesaid notes and mortgage securing the same, and said defendant, Robert E. Daggs, thereupon entered into possession of said premises and remained in such possession, as the plaintiff is informed and verily believes, up to and including the 28th day of April, 1894, by the defendant W. A. Daggs, as his tenant.

Plaintiff further shows to the court and alleges that on the 26th day of April, 1894, he commenced an action in this court against said John S. Armstrong and said R. E. Daggs for the recovery of the amount due upon said notes and mortgage and for a foreclosure of his said mortgage, the said Armstrong and R. E. Daggs being at that date the only persons known to the plaintiff to be liable upon said notes or to have any interest whatsoever in said mort-
7 gaged property; that the complaint in said action was duly filed in the office of the clerk of this court on the 26th day of April, 1894, and a summons issued to said defendants thereon,

which summons and complaint were duly and personally served on said Armstrong and R. E. Daggs, personally, on the 27th day of April, 1894. Plaintiff also filed, on said 26th day of April, in the office of the county recorder of said Maricopa county a notice of *lis pendens*, entitled in the said action and giving notice of the lands affected thereby and of other matters as required by law.

That said action proceeded to judgment in this court on the 8th day of May, 1894, against said two defendants, Armstrong and R. E. Daggs, for the full amount due the plaintiff upon said notes, with costs, and for a foreclosure of the plaintiff's mortgage aforesaid.

That an execution and order of sale was duly issued upon said judgment and said premises and property, and the whole thereof was duly sold on the 6th day of June, 1894, by the sheriff of said county, to satisfy said judgment, and was at said sale bid in by this plaintiff for the full amount of his judgment aforesaid, there being no other bid made at said sale, all of which appears by the records of this court on said action of James Wilson *vs.* John S. Armstrong and R. E. Daggs.

That afterward and on the 12th day of December, 1894, this plaintiff received from the sheriff of said county a deed of said property duly conveying or purporting to convey the same and all the interest of said two defendants therein to this plaintiff,
8 pursuant to the terms of said sale of June 6th aforesaid, there having been no redemption thereof for six months after said sale, and plaintiff has never conveyed the same, but is now the owner and holder of all the right, title, and interest in said property conveyed to him by virtue of said sale and sheriff's deed aforesaid, and also is the owner and holder of said notes and mortgage, and the same never have been paid, satisfied, or discharged, either in whole or in part, except that the first 6 months' interest thereon was paid before said last-mentioned action was commenced.

Plaintiff further shows to the court and alleges that about the time plaintiff's mortgage debt became due, as aforesaid, the said defendants, R. E. Daggs and A. J. Daggs, conspiring together to hinder, delay, and obstruct this plaintiff in the collection of his said mortgage debt, procured and caused a deed of conveyance of said property and the whole thereof to be executed by said R. E. Daggs, purporting to convey said property and the whole thereof to the defendant A. L. Johns, who was alleged to reside at the city of Chicago, in the State of Illinois, the said A. J. Daggs acting as the agent of said R. E. Daggs in making such pretended transfer.

That said deed of conveyance was dated on the 17th day of March, 1894, but the same was withheld from record until the 28th day of April, 1894, after the summons in said action aforesaid had been served upon said R. E. Daggs and two days after said *lis pendens* had been filed, and plaintiff shows that he is informed and verily believes that the same was during all said time in the control of said R. E. Daggs and his agent, A. J. Daggs, and was with-
9 held from record until after said *lis pendens* was filed and said suit commenced for the purpose of hindering and de-

laying this plaintiff in the collection of his said mortgage debt and to cheat and defraud this plaintiff.

That in and by said deed to A. L. Johns aforesaid said A. L. Johns expressly agreed and bound himself to pay the plaintiff's mortgage debt as aforesaid, but said Johns allowed said deed to be withheld from record, as aforesaid, until after said action was commenced and neither paid said debt or any interest thereon or made any inquiry of plaintiff in regard thereto, although he well knew said debt was due and payable on the 24th day of April, 1894, and plaintiff alleges on information and belief that said Johns paid nothing whatsoever for said conveyance, and that said R. E. Daggs remained in control of and the actual owner of said premises by secret trust, notwithstanding said conveyance.

Plaintiff further shows that the said W. A. Daggs, who had heretofore been in possession of said premises as tenant of said R. E. Daggs, in pursuance of said conspiracy as aforesaid, at or about the time of the recording of said deed to said Johns, to wit, on the 28th day of April, 1894, claimed and asserted to have abandoned said premises and property as the tenant of W. A. Daggs on or about the first day of April, 1894, and thereupon to have become the tenant of said A. L. Johns and to have thereupon taken possession thereof for said Johns, and plaintiff shows that such abandonment and releasing of said property was done secretly and without any notice whatsoever to this plaintiff and with intent to deceive this plaintiff into the belief that said R. E. Daggs was still the owner of said premises and possessed thereof by said W. A. Daggs as his tenant, and plaintiff, on account of said secret transfer of possession, if any was made, was so deceived as about alleged said defendants intended him to be, and his said action therefore proceeded to judgment without joining or making said Johns or W. A. Daggs defendants therein, and plaintiff had no knowledge or information whatsoever when he commenced his said action and filed his notice of *lis pendens* as aforesaid that any other person than said R. E. Daggs had any interest in or claim whatsoever to said premises.

Plaintiff further shows that on the 15th day of December, 1894, after he obtained his sheriff deed conveying said premises to him, as aforesaid, he went upon said premises described in said deed and in said mortgage, as aforesaid, and exhibited the same to said W. A. Daggs, whom he found in possession thereof, and demanded the possession thereof for himself, and said W. A. Daggs thereupon refused to surrender the same, but claimed to hold possession thereof for and as tenant of said A. L. Johns, and has from thence to this time continued to hold and occupy said premises and property and the whole thereof to the total exclusion therefrom of this plaintiff, and plaintiff has been wholly unable to obtain possession of the same or any part thereof, to the damage of this plaintiff in the sum of $1,000, and plaintiff alleges on information and belief that said holding of said W. A. Daggs is in trust and for the benefit of said R. E. Daggs and by and through the acts procurent and contriv-

ance of said R. E. Daggs and said A. J. Daggs, who is, as
11 aforesaid, the agent and attorney of said A. L. Johns.

That said premises and property consist of farming lands, with the buildings and fences and improvements thereon, and water rights connected therewith, and that the same are being neglected and suffered to go to decay by said defendants, and said defendants have neglected and refused to pay the taxes lawfully assessed against said property for 2 years last past, and have also refused to keep insured the buildings on said premises, and have otherwise committed waste upon said premises, and threaten to so continue to do, and the said property is inadequate security for the debt of plaintiff against the same, and the defendants who reside in this Territory and are liable to pay said mortgage debt are insolvent, and all others who are liable to pay the same are beyond the jurisdiction of this court, and plaintiff has no other security or means of collecting his said debt than through his lien upon said property, and is in danger of losing the same or a large part thereof.

Wherefore plaintiff prays that he may have judgment against said R. E. Daggs and A. L. Johns, who, as aforesaid, have assumed and agreed to pay said mortgage debt, for the sum of six thousand five hundred dollars, with interest thereon from the 24th day of October, 1893, at the rate of eight per cent. per annum, together with ten per cent. attorneys' fees upon the amount of said principal sum and interest, and also for the sums paid by him for taxes and insurance, and against said R. E. Daggs, A. J. Daggs, W. A.
12 Daggs, and A. L. Johns, for the sum of $1,000, his additional damages by reason of the premises stated as aforesaid, beside the costs of this action, and that the plaintiff's mortgage, as aforesaid, be adjudged wholly unpaid and unsatisfied, and that the same be foreclosed and said defendants and all of them and all persons holding under them or any of them be forever barred and foreclosed of all right, title, claim, and equity of redemption in and to said property in said mortgage described and the whole thereof, and that a receiver be appointed by this court to take possession of said property, and to apply the rents and profits thereof to the payment of the aforesaid mortgage debt and the judgment in this cause, and that he may have such other and further relief as the circumstances of the case require and justice and equity demand.

Dated June 14th, 1895.

THOS. ARMSTRONG, JR.,
Attorney for Plaintiff.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

J. W. Evans, being first duly sworn, on his oath deposes and says that he is the agent of the plaintiff, James Wilson, in the above-entitled matter; that said James Wilson is a non-resident of this Territory, and is not now therein; that affiant, as his agent, has had sole and exclusive charge of all the business of the plaintiff appertaining to the matters mentioned and set forth in the foregoing com-

plaint, and is well acquainted therewith, and makes this verification for and on his behalf and at his request; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

J. W. EVANS.

Subscribed and sworn to before me this 21st day of June, 1895.

O. SCHIFFER,
Notary Public.

[NOTARY SEAL.]

13 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. Daggs, and W. A. Daggs, Defendants.	No. 2327. Notice & Interrogatories. Received Service This 25 Day of Nov., 1896. Thos. Armstrong, Jr., Att'y for Pl'ff. Filed Nov. 25th, 1896.

To above-named plaintiff, James Wilson, and his attorney, Thos. Armstrong, Jr.:

Take notice that the above-named defendants will apply to the clerk of the above court on December 2nd, 1896, for a commission to take the answers of John S. Armstrong to the interrogatories hereto attached. Said witness resides at Wilmington, South Carolina. Said deposition will be used on the trial of the above-entitled cause on behalf of defendant-.

A. J. DAGGS,
Attorney for Defendants.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. DAGGS, Defendants.

14 *Questions to be Propounded to the Witness John S. Armstrong at Wilmington, S. C.*

First. What is your name, age, and occupation?

2. Where do you reside?

3. Where did you reside in December, 1893?

4. Did you own a tract of land adjacent to Tempe, A. T., known as the James Wilson or Farmers' tract of land, about Dec., 1893, being the N. E. ¼ of sec. 21, tp. 1 N., range 4 E., Gila and Salt River base and meridian, Maricopa county, Arizona?

5. How many acres did it contain?

6. From whom did you purchase said land?

7. Did you execute a mortgage on said land at the time you purchased it; if so, to whom?

8. Did you or did you not sell the said land on or about the 18th day of December, 1893, to P. P. Daggs?

9. Did you or did you not receive from P. P. Daggs the notes of W. A. and P. P. Daggs for the purchase-money of said land?

10. Was suit brought against you and R. E. Daggs in April, 1894, to foreclose the mortgage and recover judgment on the notes before mentioned given by you to James Wilson on the above-described tract of land for six thousand five hundred dollars?

11. What arrangements did you have with James Wilson or his attorney or agents, J. W. Evans or Thos. Armstrong, Jr., about said case?

12. Did Wilson, Armstrong, or Evans agree to release you from all liability on said notes and mortgage? State fully.

13. Did you convey lots one, eight, and nine, in block one, and lots five, in block two, in Farmers' addition to Tempe, to James Wilson, as a payment on said judgment, notes, and mortgage; if not, for what purpose did you deed them? State fully.

14. What property had you in Arizona on May 8, 1894, both real and personal? State fully.

15. What was the value of all your real estate in Arizona on May 8, 1894, and where was it situated; in what county?

16. Do you owe James Wilson, from whom you bought the above-described tract of land adjacent to Tempe, any money on any account?

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff, *vs.* A. L. JOHNS ET AL., Defendants.	Motion for Change of Venue. Received Service within Motion This 15th Day of Dec., 1896. Thos. Armstrong, Jr., Att'y for Pl'ff. Filed Dec. 21st, 1896.

To the above plaintiff and his attorney, Thos. Armstrong, Jr.:

Take notice that defendants will apply to the above court in above cause on Dec. 21st, 1896, or as soon thereafter as counsel can be heard, for a change of venue in this cause, and for cause will allege:

I.

The bias and prejudice of the Hon. A. C. Baker, judge of the above court.

II.

That the same cause and ground for a change of venue will be urged against the Hon. John J. Hawkins, judge of the fourth judicial district of the Territory of Arizona; that he is also biased and prejudiced against defendants, and that they cannot have or obtain a fair and impartial trial before him.

III.

And will ask that the case be sent to some other judge in some other district in said Territory where the alleged causes do not exist.

A. J. DAGGS, *Att'y.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS, A. J. DAGGS, R. E. DAGGS, and W. E. DAGGS, Defendants.

I.

Defendants, being first duly sworn, says that they are defendants in the above-entitled cause, and that they have cause to believe and do believe that the Hon. A. C. Baker, judge of the above court, is biased and prejudiced against them so that they cannot have or obtain a fair and impartial trial before said judge in this cause.

17

II.

Affiants further say that John J. Hawkins, judge of the fourth judicial district, Arizona Territory, is also biased and prejudiced against them so that they cannot have or obtain a fair or an impartial trial before him in this cause.

III.

Affiants therefore ask that this cause and the venue be changed to some other district before some other judge in this Territory where the alleged prejudices and cause for change of venue does not exist.

R. E. DAGGS.
W. A. DAGGS.

Subscribed and sworn to before me this 15 day of Dec., A. D. 1896.

IDA I. WOODWORTH,
Notary Public.

[NOTARY SEAL.]

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff, vs. A. L. JOHNS, A. J. DAGGS, W. A. Daggs, and R. E. Daggs, Defendants.	No. 2327. Motion for Continuance and Affidavit of R. E. Daggs. Filed Dec. 21st, 1896.

Motion for Continuance.

Comes the defendant and moves the court for a continuance of this cause to some later day in the term for the want of ma-
18 terial testimony and on account of the absence of the witness John S. Armstrong, who resides at Wilmington, Hanover county, North Carolina; said application is based upon the following affidavit:

R. E. Daggs, first having been duly sworn, says that on the 8th day of Dec., 1896, a commission was duly sued out of this court and placed in the mail, properly directed to Iredell Meares, a lawyer in Wilmington, N. C., with instructions to take the answers of John S. Armstrong before a notary public to the interrogatories thereto attached; that said deposition has not yet been returned to this court, and affiant is informed and believes that at the date of the receipt of said commission and interrogatories by said attorney that said witness was temporarily absent from his place of business and would not return until about the 20th to 22nd of Dec., 1896.

That if further time is allowed defendants can and will obtain said depositions; that John S. Armstrong is the original mortgagor who executed the instruments sued on in this action; that his testimony is very material to defendants, and the facts that said witness will testify to cannot be proved by any other witness.

That defendants can prove by said witness that the alleged indebtedness sued on in this case has been fully paid and he has been discharged.

Affiant further says that said witness is adverse to giving his testimony; that heretofore defendants attempted to procure his testimony, and that witness got information of the notice, and be-
19 fore a subpœna could be served on him left this Territory for California.

Affiant is further informed and believes that the plaintiff and his counsel are colluding to and with said witness to prevent defendants from obtaining said witness's evidence.

That this continuance is not sought for delay only, but that justice may be done defendants.

R. E. DAGGS.

Subscribed and sworn to before me this 21st day of Dec., 1896.

IDA I. WOODWORTH,
Notary Public.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. Johns, and A. J. Daggs, Def'ts.

No. 2327. Separate Answer of R. E. Daggs. Filed July 2nd, 1895.

And the said R. E. Daggs, for his separate answer to pl't'f's complaint herein, by way of demurrer to said complaint, alleges:

I.

That the said complaint does not state facts sufficient to constitute a cause of action, and defendant prays the judgment of the court as to whether he shall be compelled to make further answer thereto.

20 II.

Defendant R. E. Daggs, for his further separate answer to the complaint of plaintiff herein, denies, generally and specially, each and every allegation in said complaint contained, and prays the judgment of the court that plaintiff take nothing by his suit, and that said defendant be hence dismissed with his costs.

A. J. DAGGS,
Att'y for Def't R. E. Daggs.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Pl't'f,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. Daggs, and A. J. Daggs, Def'ts.

No. 2327. Separate Answer of A. J. Daggs. Filed July 2nd, 1895.

Comes the defendant A. J. Daggs, and, for separate answer to pl't'f's complaint, *and* demurs and alleges:

I.

That the complaint does not state facts sufficient to constitute a cause of action, and asks to be discharged without answering further herein.

II.

Def't A. J. Daggs, for his further separate answer herein, denies, generally and specially, each and every allegation therein contained; and, having fully answered herein, asks that he be dismissed hence with his costs.

A. J. DAGGS, *Pro Se.*

21 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Pl't'f,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. Johns, A. J. Daggs, Def'ts.

No. 2327. Separate Answer of W. A. Daggs. Filed July 2nd, 1895.

And the said def't, W. A. Daggs, for his separate answer to plaintiff's complaint herein, by way of demurrer to plaintiff's said complaint, alleges:

I.

That the said complaint does not state facts sufficient to constitute a cause of action, and def't W. A. Daggs prays the judgment of the court as to whether he shall be required to make further answer thereto.

II.

Defendant W. A. Daggs, for his further separate answer to the complaint of plaintiff herein, denies, generally and specially, each and every allegation in said complaint contained, and prays the judgment of this court that plaintiff take nothing by his suit, and that said defendant be hence dismissed with his costs.

A. J. DAGGS,
Att'y for Def't W. A. Daggs.

22 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Pl't'f,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. Johns, and A. J. Daggs, Def'ts.

No. 2327. Separate Answer of A. L. Johns. Filed July 2nd, 1895.

And the said defendant, A. L. Johns, for his separate answer to the complaint of plaintiff herein, by way of demurrer to said complaint, alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action, and defendant prays the judgment of the court as to whether he shall be required to make further answer thereto.

II.

Defendant A. L. Johns, for his further separate answer to the complaint of plaintiff herein, denies, generally and specially, each and every allegation in said complaint contained, and prays the judgment of this court that the plaintiff take nothing by his suit, and that said def't be hence dismissed with his costs.

A. J. DAGGS,
Att'y for the Def't A. L. Johns.

23 In the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

JAMES WILSON, Plaintiff, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. Daggs, and W. A. Daggs, Defendants.	Separate Amended Answer of A. L. Johns. Rec. Copy of within Answer This Nov. 2, 1895. Thos. Armstrong, Jr., Att'y for Pl't'f. Filed Nov. 5, 1895.

Comes defendant A. L. Johns, and for separate answer to plaintiff's complaint demurs, and for grounds of such special demurrer alleges:

I.

That plaintiff is not entitled to recover in this action in his own right.

II.

That plaintiff is not suing in the right of the mortgagor.

III.

That plaintiff's petition shows no privity of contract between plaintiff and defendants.

IV.

That no reason is shown why plaintiff's first and former judgment is not sufficient.

V.

That no reason is shown why W. A. Daggs and A. L. Johns *was* not made parties to the original action.

VI.

That no reason is shown for not applying for relief in the
24 former foreclosure suit.

VII.

That no reason is shown for a second decree—no reason being shown why plaintiff could not collect his debt by execution on his former judgment against the mortgagor.

VIII.

That the mortgagor is not before the court.

IX.

That no separate action can be maintained on a mortgage and debt, it being shown to have once merged in a judgment.

X.

That plaintiff has joined in his petition causes of action *ex contracto* with causes of action *ex delicto*.

XI.

That plaintiff has misjoined parties defendant.

XII.

That plaintiff's petition shows that he already has a judgment against defendant R. E. Daggs for the same debt and mortgage that forms one of the foundations of this action.

XIII.

That plaintiff has made a mistake of law, and this court is without jurisdiction to grant relief.

XIV.

Wherefore def't prays judgment that pl't'f take nothing by his action; that this def't go hence without day and recover his costs herein expended.

A. L. JOHNS,
By A. J. DAGGS,
Att'y for Def't.

25 If defendant's demurr- be by the court overruled, defendant, further answering, denies each and every allegation of plaintiff's complaint not hereinafter admitted or otherwise plead.

1st.

Denies that R. E. Daggs purchased said premises of John S. Armstrong on the 18th day of Dec., 1893, or on any other day, or that R. E. Daggs received a deed from John S. Armstrong, wherein and whereby he bound himself to pay plaintiff or said Armstrong the mortgage and notes described in plaintiff's complaint, but admits that R. E. Daggs entered into possession as alleged, but alleges that such possession only continued up to April 1st, 1894.

2nd.

Defendant ayers the fact to be that in Dec., 1893, John S. Armstrong sold said premises described in plaintiff's complaint to P. P. Daggs, and said Daggs received from said Armstrong a deed containing covenants of general warrant*ee;* said deed was executed on Dec. 18, 1893, duly acknowledged and filed for record, expressing a consideration of $11,000.00, which sum said deed receipted and acknowledged as fully paid; said deed was executed by said Armstrong, conveying the said lands to R. E. Daggs, a codefendant herein; that said premises *was* on the 18th day of Dec., 1893, sold to said R. E. Daggs by said P. P. Daggs, and said deed from said Armstrong executed, as aforesaid, was duly delivered to said R. E. Daggs by said P. P. Daggs, wherein and whereby said Armstrong covenants to warrant and defend the title to said premises against every person claiming or to claim the same, as well as against plaintiff's said mortgage.

26 3rd.

Further answering, avers that the said P. P. Daggs did not assume or agree to pay the said mortgage or debt described in plaintiff's complaint, or any part thereof, by aforesaid deed or otherwise, or that P. P. Daggs was liable to plaintiff or said Armstrong for said debt in any manner.

4th.

Further answering, avers that the said R. E. Daggs did not assume or agree to pay the said mortgage or debt described in plaintiff's complaint by aforesaid deed or otherwise, or that said R. E. Daggs was or is liable for said debt to plaintiff or any one in any manner.

5th.

Defendant admits that plaintiff commenced an action in this court on the 26th day of April, 1894, to recover his alleged debt and foreclosure of his said mortgage, and that said action proceeded to judgment on May the 8th, 1894, wherein said plaintiff recovered judgment against John S. Armstrong, the mortgagor, for the same debt and mortgage set forth in this action.

6th.

Defendant admits that he purchased said property from his co-defendant R. E. Daggs on or about March 17th, 1894, and received possession of same April 1st, 1894, and continued in possession, and is now the owner and holder of said property; all of which purchase and taking possession, as aforesaid, was well known to plaintiff on April 26, 1894, and at all times theretofore and thereafter.

27 7th.

Defendant denies that by the terms of said deed of March 17th, 1894, he assumed or agreed to pay said note or mortgage debt as described in plaintiff's complaint, or that he is liable on said debt in any manner.

8th.

Defendant avers the fact to be that on or about April 29, 1894, and after plaintiff had filed his petition and *lis pendance* as alleged on April 26, 1894, plaintiff agreed with R. E. Daggs, the grantor of this defendant, and it was agreed that said plaintiff would waive all right of action against said R. E. Daggs, if any he had, if said R. E. Daggs would make no defense to said action, and in pursuance to said agreement said Daggs made no defense to said action, but suffered same to go by default.

9th.

Defendant avers that it is not true that plaintiff did not know that this defendant had any interest in said premises on April 26, 1894, at the date of the filing of his former action to foreclose, but

avers the fact to be that this defendant was the owner and in actual possession of said premises by his tenant, W. A. Daggs, and ever since has been and is now, all of which was well known to plaintiff and his agents; that plaintiff was requested to make this defendant a party to said action, but wholly failed and refused so to do, and defendant alleges plaintiff was then and is now colluding and combining and conspiring with the mortgagor, John S. Armstrong, to cheat and defraud this defendant out of his just rights in said premises by claiming said debt is due and unpaid.

28

10th.

Defendant avers that he is informed and believes that John S. Armstrong has conveyed lots 1, 8, and 9, in block 1, and lots 5, in block 2 to Farmers' addition to the town of Tempe, as part payment of said judgment of May the 8th, 1894, described in plaintiff's complaint; that said lots are worth $1,000.00, and that plaintiff is wrongfully pursuing this defendant for said amount.

11th.

Defendant avers the fact to be that said property described in plaintiff's complaint is worth more than $12,000.00, and that defendant purchased the same in good faith and paid a valuable consideration therefor, and that he recorded his deed with all convenient speed.

12th.

Defendant admits that plaintiff has a judgment against John S. Armstrong (the mortgagor) as described in plaintiff's complaint, and that said judgment was rendered for the same debt and for the foreclosure of the same mortgage as sued on in this action, and avers that said judgment is a valid lien on all the real property of the said Armstrong in this county, consisting of town property and farming land worth more than $30,000.00, and avers the fact to be that said defendant is perfectly solvent and is worth more than $30,000.00 over and above this just debt, and alleges that all the defendants hereto are perfectly solvent except W. A. Daggs.

Wherefore defendant demands judgment that plaintiff take nothing by this action; that he be required to pursue his remedy by execution on his judgment of May 8th, 1894; that the court decree that this mortgage and note sued on has merged in his said judgment, and that defendant go hence without day and recover his cost herein expended, and such other relief as to the court may seem just.

A. J. DAGGS,
Att'y for Defendant.

29 In the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

JAMES WILSON, Plaintiff, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. Daggs, and W. A. Daggs, Defendants.	Separate Amended Answer of R. E. Daggs. Rec. Copy of within Answer This November 2nd, 1895. Thos. Armstrong, Jr., Att'y for Pl't'f. Filed Nov. 5th, 1895.

Comes defendant R. E. Daggs, and for separate answer to plaintiff's complaint demurrs, and for grounds of such special demurr- alleges:

I.

That plaintiff is not entitled to recover in this action in his own right.

II.

That plaintiff is not suing in the right of the mortgagor.

III.

That plaintiff's petition shows no privity of contract between plaintiff and defendants.

IV.

That no reason is shown why plaintiff's first and former judgment is not sufficient.

V.

That no reason is shown why W. A. Daggs and A. L. Johns *was* not made parties to the original action.

30 VI.

That no reason is shown for not applying for relief in the former foreclosure suit.

VII.

That no reason is shown for a second decree, no reason being shown why plaintiff could not collect his debt by execution on his former judgment against the mortgagor.

VIII.

That the mortgagor is not before the court.

IX.

That no separate action can be maintained on a mortgage and debt, it being shown to have once merged in a judgment.

X.

That plaintiff has joined in his petition causes of action *ex contracto* with causes of action *ex delicto*.

XI.

That plaintiff has misjoined parties defendant.

XII.

That plaintiff's petition shows that he already has a judgment against defendant R. E. Daggs for the same debt and mortgage that forms one of the foundations of this action.

XIII.

That plaintiff has made a mistake of law, and this court is without jurisdiction to grant relief.

XIV.

Wherefore defendant prays judgment that plaintiff take
31 nothing by his action; that def't go hence and recover his costs herein expended.

R. E. DAGGS, *Pro Se.*

If defendant's demurr- be by the court overruled, defendant, further answering, denies each and every allegation of plaintiff's complaint not hereinafter admitted or otherwise plead.

1st.

Defendant admits the residence of plaintiff & defendant as alleged.

2nd.

Admits the execution and delivery of the notes and mortgage by John S. Armstrong as alleged.

3rd.

Admits that the property as described was embraced in said mortgage as alleged.

4th.

Admits that the conditions of said mortgage were as alleged.

5th.

Defendant avers that he has no knowledge or information as to whether said mortgage was given for the purchase-money of said land and property described, and therefore denies the same.

6th.

Defendant specifically denies that on the 18th day of Dec., 1893, that he bought the said premises of John S. Armstrong or on any
32 other day, but avers the fact to be that this defendant purchased the land and property described in plaintiff's complaint of P. P. Daggs and received from P. P. Daggs a good and sufficient warrantee deed, executed by the said John S. Armstrong, wherein

and whereby the said John S. Armstrong by said deed bound himself, his heirs, administrators, and assigns, to warrant and defend the title against claims of every nature as well as against plaintiff's said mortgage, all of which was well known to plaintiff when he brought his said action.

7th.

Defendant specifically denies that he by deed received from said John S. Armstrong or otherwise bound himself, his heirs, administrators, executors, or assigns, to pay or cause to be paid to plaintiff the notes and mortgage described in plaintiff's complaint.

8th.

Admits that *that* defendant entered into possession as alleged, but denies that he continued in such possession up to the 28th day of April, 1894, or that plaintiff has ever been informed or believes the same.

9th.

But avers the fact to be that this defendant sold said premises to his codefendant, A. L. Johns, on about March —, 1894, and delivered possession of same on April 1st, 1894, to said Johns, which fact was well known to plaintiff.

33

10th.

Admits that plaintiff brought an action on April 26th, 1894, as alleged and for the purpose as alleged, and that said complaint was filed and served as alleged, and that plaintiff filed a notice of said action as alleged and for the purposes as alleged.

11th.

Defendant denies that plaintiff did not know that any one but R. E. Daggs, this defendant, and John S. Armstrong was the only owner of said premises, but avers the fact to be at the date of bringing said action and at all the times thereafter and heretofore mentioned in plaintiff's complaint plaintiff well knew the said A. L. Johns was the legal owner and holder of said premises.

12th.

Admits that said action proceeded to judgment against defendant John S. Armstrong for the full amount of plaintiff's debt, damages, and cost, with a foreclosure of the plaintiff's said mortgage against said Armstrong and this defendant, but denies that any personal judgment was taken against this defendant.

13th.

Defendant avers the fact to be that at the time of bringing said action plaintiff's attorney agreed with this defendant that if this defendant would not file any answer or make any defense against said

action plaintiff would not take any personal judgment against this defendant, but would waive any right or claim he might have against this defendant.

34 14th.

Defendant further avers that in pursuant to said agreement no answer was filed by him to said action or defense made thereto.

15th.

Defendant further avers the fact to be that on the 8th day of May, 1894, in pursuance to the foregoing agreement, plaintiff, by attorney, in open court waived all right of claim against this defendant, if any he had.

16th.

Admits that said judgment was executed as alleged and the premises sold as alleged and bid in by plaintiff, and that plaintiff — now the owner and holder of all the interest conveyed by said sheriff's deed, but denies that said notes and mortgage have never been paid, but avers the fact to be that said judgment has been fully discharged, as shown by the records of this court.

17th.

Admits the execution of the deed to said premises to A. L. Johns, as alleged, but denies that the same was pretended or anything but a *bona fide* business transaction, or that the same was withheld from record, or that said deed was all the time in the possession of this defendant and A. J. Daggs.

18th.

Defendant denies that A. L. Johns bound himself by said deed to pay plaintiff the mortgage debt, as described aforesaid, or that said Johns allowed said deed or caused same to be withheld from record, or that said Johns knew said debt was due, or that said Johns
35 had any interest in said debt.

19th.

Defendant avers the fact to be that said Johns bought said premises for a valuable consideration and took possession in the due course of time and is now the legal owner and holder of same.

20th.

Defendant admits that W. A. Daggs was his tenant up to April 1st, 1894, but denies that he made any secret abandonment or any abandonment of this defendant's possession not known to plaintiff.

21st.

Defendant denies specifically that plaintiff had no knowledge that any one but this defendant had any interest in said property

at the date of bringing his said action to foreclose and the filing of his *lis pendens* on April 26, 1894, but avers the fact to be that at the date of filing his said action said W. A. Daggs was in actual possession as tenant under A. L. Johns and had been prior thereto, which fact was well known to plaintiff.

22nd.

Defendant further avers the fact to be that soon after the filing of plaintiff's action to foreclose on April 26th, 1894, and after said A. L. Johns had filed his said deed to said premises and long prior to May the 8th, 1894, and before plaintiff had recovered judgment in his first foreclosure proceedings, this defendant informed plaintiffs and his agents and they were informed by other parties of the title of said A. L. Johns and requested plaintiff to make said
36 Johns party to said action, but plaintiffs wholly failed and refused to make said Johns party to said action or to recognize any rights said Johns had to said property, claiming said deed from R. E. Daggs to Johns from March 17, 1894, being filed after said notice of suit, conveyed no title to said Johns against plaintiff.

23rd.

Defendant avers the fact to be that said decree was obtained and said action proceeded to judgment with full knowledge of all the facts in possession of plaintiff.

24th.

Defendant further avers the fact to be that plaintiffs and his agents are combined and are conspiring to cheat and defraud the said Johns out of said property by pretending said debt is not paid, and are combining and conspiring with one John S. Armstrong, and have agreed to and have discharged said Armstrong, the mortgagor, from all liability on said debt.

25th.

Defendant avers the fact to be that said property is worth more than $12,000.00 and equal to more than twice plaintiff's pretended debt.

26th.

Defendant further avers the fact to be that this defendant and said John S. Armstrong (whom plaintiff alleges he has judgment against) is worth more than $30,000.00 over and above their debts and are perfectly solvent and have abundance of property in the jurisdiction of this court out of which an execution on said
37 judgment of May 8, 1894, could be satisfied.

27th.

Defendant further avers the facts to be that this defendant was not liable to the said P. P. Daggs or plaintiff, and the said P. P. Daggs was not liable to plaintiff for the debt sued on or set forth in

plaintiff's petition in any manner, or to the said John S. Armstrong or to any person whomsoever.

28th.

Defendant avers the fact to be that the plaintiff has combined with the said mortgagor, John S. Armstrong, to cheat and defraud this defendant and the said A. L. Johns, and has agreed to hold said Armstrong harmless from loss and to return any and all moneys paid by said Armstrong to plaintiff; that the said Armstrong has (since the bringing of the said action of April the 26, 1894) conveyed lots 1, 8, 9, in block 1, and lots 5, in block 2, in Formers' addition to the town of Tempe, to plaintiff, which said lots were not included in said petition of April 26, 1894, but were purposely omitted. Defendant avers *that* on information and belief that said lots were conveyed to plaintiff as part payment on plaintiff'- said mortgage; that said lots *is* worth more than one thousand dollars.

Defendant says that plaintiff is seeking to defraud defendant out of the value of said payment and obtain a personal judgment over and against him.

29th.

Defendant avers the fact to be that all the matters and facts set forth in plaintiff's petition herein and plaintiff'- notes and
38 mortgage and all things pertaining thereto were fully adjudicated and final judgment rendered in an action in this court filed April 26, 1894. Said judgment was rendered on May 8, 1894, which is fully shown by the records of this court.

Wherefore defendant asks judgment that he go hence without day and recover his cost herein expended.

R. E. DAGGS, *Pro Se.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. Johns, and A. J. Daggs, Defendants.

No. 2327. Reporter's Transcript of Evidence. Filed Dec. 31, 1897.

Tried to the court on the 21st of Dec., 1896.

Before his honor A. C. Baker, judge of said court, at the courthouse, Phœnix, A. T.

Appearances: Thos. Armstrong, Jr., Esqr., attorney for plaintiff; A. J. Daggs, Esqr., attorney for defendants.

39 An action brought by plaintiff against the defendants to recover judgment against the defendants upon their covenant to pay a certain mortgage which plaintiff has heretofore foreclosed.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
DAGGS, JOHNS, ET AL., Defendants.

Be it remembered that on 21st day of December, A. D. 1896, that being a regular judicial day of the November term, 1896, of the said court in and for the said county and Territory then holden, the within-entitled cause coming on regularly to be heard on the pleadings and proof, parties to this cause being present in open court and represented by their respective counsel, Mr. Thos. Armstrong, Jr., attorney for plaintiff, and A. J. Daggs, Esqr., attorney for the defendants, to maintain by them the issues joined, the said cause proceeded on trial and the respective parties offered in evidence the testimony and documentary evidence as hereinafter fully set out in this transcript of evidence and proceedings, the same being reduced from the court reporter's shorthand notes taken upon the trial of said cause.

That upon the introduction of said testimony and documentary evidence the following objections were interposed then and
40 there by the respective counsel, rulings by the court made, and exceptions to said rulings taken and noted at the times and in the manner as therein set forth in this transcript of evidence, which is as follows, to wit:

Testimony for the Plaintiff.

By the COURT: Are you ready in this case of Wilson against Daggs *et al.?*

By Mr. ARMSTRONG: Plaintiff is ready.

By Mr. A. J. DAGGS: Defendants are ready, your honor.

By the COURT: You may proceed.

Counsel for plaintiff makes statement of the case, and offers in evidence, first, the record in this court in the case of Wilson against Daggs, No. 1954, with the sheriff's certificate of sale in that case.

Defendant objects to the introduction of the plaintiff's offer, as it is not sufficient to constitute any cause of action against defendants in this case, and it is *res judicata*. Objection overruled and same duly admitted and marked Plaintiff's Exhibit A. Defendant excepts to the ruling of the court.

MAJOR EVANS, a witness called, sworn according to law, and examined upon his oath, testified as follows, to wit:

Examination by Mr. ARMSTRONG:

Q. Where do you reside and what is your name?

A. My name is J. W. Evans, and I reside in Phœnix, A. T.

Q. Are you acquainted with the parties to this action?

41 A. Yes, sir.

Q. State whether or not you have acted for the last two or three years as the agent of the plaintiff in this case, Mr. James Wilson.

A. Yes, sir; for 8 or 9 years I have had the exclusive charge of his business, so far as I know.

Q. How long have you had a knowledge of the subject-matter pertaining to this suit?

A. For a year, at least.

Q. Where does James Wilson, plaintiff in this suit, reside?

A. In Ballentine, Buck county, Illinois, and he has lived there for a good many years.

Q. How long since he was in this Territory?

A. I think it was in 1892; that was the last time he was here.

Q. After the sheriff's sale and the delivery of the deed upon the sale under the execution in case of Wilson against Mr. Armstrong and R. E. Daggs, state whether or not you took the sheriff's deed and went down to the lands in question in this case.

Defendant objects to the question as immaterial, incompetent, and irrelevant, and for the further reason that it is not yet shown that any such case exists.

Objection overruled, and defendant excepted to the ruling of the court.

A. I don't remember whether I took the deed that the sheriff gave to this land in question or not when I went and demanded possession of the property, but as soon as the deed was delivered to me I had it recorded, and it was subsequent to that time that I made

42 a demand for the possession of the property.

Q. Whom did you find in possession of the property at that time?

A. W. A. Daggs.

Q. Did you obtain possession of the property for Mr. Wilson?

A. I did not. He said that he wouldn't give possession of the property then, but he would consider it later and let me know, but he subsequently said that he refused to give it up.

(Defendants move to strike out the answer because it was not in the presence of defendant Johns. Objection overruled, and defendants except.)

Q. What reason did he give for refusing to give possession?

A. I don't remember that he assigned any reason.

Q. Has Mr. Wilson ever obtained possession of that property in question?

A. No, sir.

Q. Who is in possession of the property now, to the best of your recollection?

A. W. A. Daggs.

Q. Have you visited the property since that time and tried to obtain possession?

A. Yes, sir; several times. I cannot recall to mind now when, but it was in the latter part of September of the present year, and the first of October, I think, was the last time.

Q. And Mr. Wilson never has conveyed or disposed of this property since that time?

(Defendant- objects to the question.)

43 A. Not to my knowledge.

WITNESS (addressing the court): Is it proper for me to state my mission on the last visit?

Q. Yes; it was for the purpose of getting possession, was it?

A. Yes, sir.

Q. And you saw Mr. Daggs there?

A. Yes, sir.

Q. And Mrs. Daggs?

A. Yes, sir.

Q. You asked possession of them and they refused?

A. Yes, sir.

(Defendants object and move to strike out the answer. Motion is denied and defendants except.)

Witness excused.

By Mr. ARMSTRONG: Plaintiff demands from R. E. Daggs, who is now present in court and one of the defendants in this case, a deed executed by John S. Armstrong to him, dated in June, 1893, and recorded in volume 35 of Deeds, at page 268.

By Mr. R. E. DAGGS (presenting the deed in question): I think that is it.

By Mr. ARMSTRONG: We offer this deed in evidence, dated December 18th, 1893, between John S. Armstrong and Robert E. Daggs, of Chicago, State of Illinois, party of the second part, and recorded in this county on the 19th day of December, 1893, in Book 35 of Deeds, at page 268, covering the land in question or a large portion of it. We will have this identified as Plaintiff's Exhibit B.

44 The purpose of this deed is: The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of $2,350; it is executed by John S. Armstrong to James Wilson and S. A. Wilson, his wife, and is secured by mortgage on the land hereby conveyed. We will offer the deed in evidence; we will ask leave to withdraw the deed and return it by substituting a copy. Defendant R. E. Daggs objects to the same because it does not refer to any matters in the suit and is immaterial, incompetent, and irrelevant. Objection overruled and defendants except.

By Mr. ARMSTRONG: I will ask Mr. A. J. Daggs, who is here present in court, to produce a deed executed by R. E. Daggs to A. L. Johns, dated the 17th day of March, 1894, and recorded April 28, 1894, in Book 36 of Deeds, at page 110, of the records of this county.

By Mr. A. J. DAGGS: I have no idea in the world where it is. I think Mr. Johns has it.

By Mr. ARMSTRONG: Then we will ask to offer the record of it in place of the original deed, and I will state that the purposes of offering the deed is to show, as was shown in the one from Armstrong to Daggs, that he assumes to pay the note and mortgage described in this case—that is, the clause in the deed.

We will offer in evidence the deposition of A. L. Johns taken in the case of James S. Goodwin against W. A. Daggs, A. L. Johns, *et al.*, and filed in the office of the clerk of this court in that case.

(Defendants object to the introduction of the same because the defendants have no notice about the production of this in-
45 strument. Defendant R. E. Daggs objects to the same as incompetent, immaterial, and irrelevant.)

Objection overruled and exception taken. Same admitted as Plaintiff's Exhibit C.

The court remarking: It may be admitted, but it will be limited to the defendant Johns.

By A. J. DAGGS, Esq.: We admit that he purchased the land.

By Mr. ARMSTRONG: I am going to show that he purchased it among other questions asked the defendant in that deposition.

(Counsel for plaintiff reads deposition of A. L. Johns.)

(Defendant- objects to interrogatory No. 4, that it does not pertain to this land.)

By Mr. ARMSTRONG: In answer to the second interrogatory he says: I have known Mr. Daggs since 1884.

(Counsel for plaintiff continued reading the deposition in evidence.)

By Mr. A. J. DAGGS: We object to this, for this is referring to the consideration in another case and has no reference to the consideration of the lands in question in this case.

Objection overruled and defendants except.

R. E. DAGGS, a witness called on behalf of plaintiff and duly sworn according to law, was examined, and testified as follows, to wit:

Examination by Mr. ARMSTRONG:

Q. Are you one of the defendants in this case?

A. I am.

46 Q. Do you remember the date when the summons was served on you in the case of Wilson against Armstrong and R. E. Daggs?

A. I do not. Do you refer to this case?

Q. No, sir; I referred to a previous case.
A. I do not.
Q. Where were you at the time the summons was served upon you?
A. I don't remember; it has been too long ago.
Q. Were you president of the Tempe bank at that time—in April, 1894?
A. Yes, sir.
Q. Where was this deed from you to Johns at that time—at the time the summons was served on you in this case of Armstrong and Wilson against Daggs?
A. I don't know.
Q. How long since you have seen it?
A. I don't remember now, but I suppose I haven't seen it since I executed it.

Cross-examination:

By Mr. A. J. DAGGS: What is the purpose of that?
A. This deed was recorded at the request of the Bank of Tempe and this was recorded at 8 o'clock on the following day in which I was served with the summons in this case.

Redirect examination.

By Mr. ARMSTRONG, Jr.:

Q. Were you present at the time of the summons of this case?
A. Yes, sir.
Q. Do you know when the deed from yourself to Johns was recorded?
47 A. I do not know; I will state that there was a good many deeds that came in to our bank, and we forwarded them to be recorded.
Q. Were you living at Tempe at the time that summons was served upon you?
A. Yes, sir.
Q. W. A. Daggs is your brother, is he?
A. Yes; that is what my mother says.
Q. Was there any change of position of this real estate in question as to the persons actually in possession of it between the first day of March and the first day of April, 1894?
A. Do you mean that there was anybody in possession except W. A. Daggs?
Q. Yes, sir; in actual possession.
A. It is not my remembrance that there was.
Q. And W. A. Daggs has remained in actual possession ever since?
A. Yes, sir.
Q. And he is in possession today?
A. Yes, sir.
Q. Who is he holding that land for now?

A. He is holding that land for the owner of the land.
Q. Who is he holding the land for?
A. For the London Company, if I remember right.
Q. What is that?
A. It is a corporation here in this Territory.
Q. It is an Arizona corporation?
A. Yes, sir.
48 Q. When was that organized?
A. It has been in existence for two years and more.

(Defendants object to that, as it has no relevancy to the issues in this case.)

By the COURT: Is there any *lis pendens* on file?
By Mr. ARMSTRONG: Yes; in the original case of that time.

(Objection is overruled. Defendants except.)

By ARMSTRONG:

Q. When was this London Company incorporated?
A. I cannot tell without referring to records.
Q. Is it incorporated in this county?
A. Yes, sir.

(Defendant- objects to the question as incompetent and immaterial. Objection overruled and defendants except.)

Q. Who was it incorporated by?
A. The articles of incorporation will show.
Q. Were you one of them—one of the incorporators?
A. Yes, sir.
Q. And A. J. Daggs was another one?
A. I don't think so.
Q. How much did the London Company pay to A. L. Johns for this land?
A. $10,000, I believe.
Q. How was it paid?
A. In stock, so far as I know, but I am only testifying from hearsay.
Q. Who is the secretary of the London Company?
49 A. When?
Q. Now.
A. I am.
Q. What other property had the London Company at the time it transferred its stock of $10,000 to A. L. Johns?

(Defendant- object to the introduction of any testimony relative to the London Company for the reason that it is not a party to this suit. It is incompetent, immaterial, and irrelevant. Objection overruled by the court, and defendant- excepts.)

A. It has about 320 acres of alfalfa land in this valley and 600 acres in Coconino county, this Territory, and a contract and guarantee for sufficient money to buy 500 head of cows and $50,000.

Q. Was this land free from incumbrance—this 320 acres and the 600 acres?

A. I think so.

Q. Do you know?

A. No.

Q. Why was the deed from A. L. Johns to the London Co. given?

A. The deed will show.

Q. How long before that deed was recorded was it dated?

A. The deed will show; don't remember.

Q. You are the secretary of the London Co.?

A. I am secretary. I told you so a while ago.

Q. Did you have that deed in your possession?

A. When?

Q. At any time.

50 A. No, sir; I think the president had that deed. He attended to it.

Q. Who recorded it?

A. I think the president did.

Q. Did you ever see the deed?

A. Yes, sir; I think I have seen it. I will state for your information that I did not have anything to do with the transaction, but the president made the purchase.

Q. What consideration did you receive from A. L. Johns for this land on March 17th, 1894?

(Defendants object to the question because it has no reference to the issues in this case. Objection overruled, and defendants except.)

A. The expressed consideration was $11,500.

Q. What did you receive?

A. $11,500.

Q. What actual consideration did you receive?

A. I got cattle and other property in the valley, and this was figured in at $11,500, and it was pertaining to this trade there was a lot of notes and accounts.

Q. State what other property.

A. There was some grain and some live stock.

Q. Do you mean that A. L. Johns transferred certain notes to you?

A. Yes, sir.

Q. Whose notes, and what were they?

A. There was one note on John Confer.

Q. How much was that note for?

51 A. $5,000.

Q. Who was it payable to?

A. To Mr. Johns.

Q. To Mr. A. L. Johns?

A. Yes, sir.

Q. Where does this man Confer live?

A. He lives in Minneapolis, Minnesota.

Q. Do you know his street and number there?

A. No, sir.
Q. Did you ever see him?
A. No, sir.
Q. You haven't seen him up to the time you took that note?
A. No, sir.
Q. And you haven't seen him since?
A. No, sir.
Q. Has the note ever been paid?
A. No, sir.
Q. Where is the note?
A. I have transferred it again.
Q. What did you do with it?
A. I transferred it to another party.
Q. To whom?
A. To James Jennings.
Q. Who is he?
A. He is a broker in Chicago.
Q. When did you make that transfer?
52 A. I don't know, but it was along about that time.
Q. About when was it?
A. About April some time.
Q. Of the same year that this trade was made?
A. Yes, sir.

(Defendants object to the question as immaterial, incompetent, and irrelevant. No ruling by the court.)

Q. What did you receive for that note?
A. My note.
Q. You said this man Jennings had that note at that time?
A. Yes, sir.
Q. How long had he had that note?
A. He had had it about two years, I believe.
Q. And for how much was it?
A. Five thousand and some odd dollars.
Q. Was there anything paid on that note at any time, or state whatever was paid on it?
A. There was $50 or $100 paid; the difference was paid.

(Defendant objects to the same as immaterial, incompetent, and irrelevant. Objection overruled, and defendants excepts.)

Q. How much did you say was the difference?
A. I think $50 or $100.
Q. Do you know where that note is that you took up?
A. I probably have it if I have not destroyed it.
Q. What else did you receive from Mr. Johns?
A. I think, if I remember right, that he shipped 3 or 4 or
53 5 cars of screenings.
Q. Where did he ship them to?
A. To Chillicothe, Illinois.
Q. Who did he ship them to?
A. To A. J. Daggs.

Q. Was A. J. Daggs at Chillicothe at that time?
A. Yes, sir.
Q. Were they billed to you or to A. J. Daggs?
A. I don't remember.
Q. Did you receive them?
A. No; sir; I was not there.
Q. How much did you realize out of this?
A. He fed them to some stock. I don't know how much he realized out of them.
Q. Then he realized out of them and not you?
A. I suppose so.
Q. Mr. Johns' stock, was it?
A. No.
Q. Has he ever accounted to you for the proceeds?
A. Yes.
Q. How much did he account for?
A. I don't remember; but if I had the schedule of the settlement I could tell.
Q. What else did you get from A. L. Johns up to that time?
A. I got some other notes.
Q. Tell me whose notes they were.
54 A. Why, I got one note of Mr. Phillips.
Q. Where does he live?
A. Over in Missouri, in Scotland county.
Q. At what place?
A. In Jefferson township.
Q. How much was that for?
A. For $500.
Q. Is that paid?
A. Yes, sir.
Q. When was it paid?
A. Some time afterwards.
Q. Was it paid to you?
A. No, sir.
Q. What did you do with that note?
A. It was paid to A. J. Daggs. I turned it over to him for collection.
Q. Was it paid in full?
A. Yes, sir.
Q. How much did you receive for it?
A. Five hundred and some dollars.
Q. Can you tell the date when it was paid?
A. It was some time in the sumner of 1894.
Q. Did this man Phillips live in Scotland county, Mo.?
A. Yes, sir.
Q. Is he any relation of yours?
A. No, sir.
55 Q. What else did you get from A. L. Johns in the trade?
A. I got 2,000 head of sheep.
Q. Where were they?
A. They were in the Chillicothe stock yards.

Q. You stated that at the time of this deal that Mr. Johns was in Chicago and these sheep were in the Chillicothe stock yards?
A. Yes, sir.
Q. Had you seen the sheep?
A. No, sir.
Q. Whose sheep were they?
A. They were Mr. Johns' sheep. He claimed them, at least.
Q. What did you do with these sheep?

(Defendants object to that kind of cross-examination of their own witness. Objection overruled. Defendants except. Defendants object for the reason it is immaterial, incompetent, and irrelevant, and has no reference to the issues in this case. Objection overruled, and defendants except.)

A. I shipped them into Chicago and sold them on the market.
Q. Who did you ship them to?
A. I don't know.
Q. Isn't it a fact that you shipped them to A. L. Johns and that he sold them?
A. He might have sold them. He is in that business.
Q. Isn't it a fact that they were shipped by him and sold by him?
A. I don't know. I think A. J. Daggs shipped them and some commission man sold them. His firm is Martin, Hall,
56 Young & Co. We shipped a good deal of stuff to them and we shipped a good deal to other firms.
Q. Do you know which firm got these sheep?
A. I do not know.
Q. What became of the proceeds of these sheep?
A. I got it.
Q. When did you get it?
A. Some time after the sheep were sold.
Q. How long after?
A. If I had the books of the Bank of Tempe I could tell you.
Q. *Was* they turned in to that bank?
A. Yes; on my account.
Q. How much did you get?
A. $2,000, I think.
Q. You got a draft for $2,000 for these sheep?
A. Yes, sir; a part of it was for the sheep.
Q. What else was included in that draft?
A. Nothing else.
Q. And that draft was for these sheep?
A. Yes; a part of the money.
Q. What became of the rest of the money?
A. We settled the rest of it when I met A. J. Daggs.
Q. Then he was acting as your agent at that time?
A. Yes, sir; in the entire matter; he was there and I was not.
Q. Where were you at the time the deal was made with Mr. Johns?
A. Which deal do you refer to?

57 Q. At the time Mr. Johns purchased this land?

A. I was at Flagstaff.

Q. Had you had any correspondence with Mr. Johns up to that time?

A. No, sir; I was acting through the agency of Mr. A. J. Daggs all the time.

Q. What else did you get from Mr. Johns for the purchase of this land?

A. I think that is all.

Q. You say that W. A. Daggs was in possession of this land prior to the time of the sale to Mr. Johns by you?

A. I didn't say anything about it.

Q. Well, I now ask you whether he was or not.

A. He was.

Q. Do you know what you did with the deed you executed to Mr. Johns?

A. I sent it to him, of course, or sent it to Mr. A. J. Daggs for him.

Q. Who represented Mr. Johns at Tempe?

A. I didn't know anything about Mr. Johns' business.

Q. You don't know anything about it?

A. No, sir; I don't know anything about whether he had a representative or not.

Q. I will ask you further whether you had any lease with W. A. Daggs upon that property at that time.

A. At the time and during the time I owned it?

Q. Yes, sir.

A. Yes, sir.

Q. Had this lease run out at the time you made this sale to Johns?

58 A. Yes, sir.

Q. Was that lease in writing?

A. I don't think it was—no. I don't think my lease expired until about April the 1st following my sale to Mr. Johns—that is, in 1894.

Q. Were you in possession of the land under the deed that you got from Mr. Armstrong?

A. Not in actual possession, but I was by my possession through W. A. Daggs. I found him in possession when I bought it, and he remained in possession as long as I owned it, and when I sold it he made arrangements with Mr. Johns. That is all I know about it.

By Mr. ARMSTRONG: I think that is all, with the exception of the recorder, whom we shall want to testify as to these deeds.

Witness excused.

F. W. SHERIDAN, a witness called on behalf of the plaintiff, was duly sworn according to law, and upon examination testified as follows, to wit:

By Mr. ARMSTRONG: Have you Book No. 36 of Deeds, records of Maricopa county?

A. Yes, sir.

Q. Please turn to page 110 and state what that is recorded there.

A. It is a war-antee deed of R. E. Daggs in the city of Chicago, county of Cook and State of Illinois, for a consideration of $11,500 in hand paid to A. L. Johns, of the same place.

(Plaintiff offers the same in evidence and asks to have the same identified as Exhibit B in place of the original deed, which
59 is demanded and refused.)

(Defendants object to the introduction of the same.)

By Mr. ARMSTRONG: We will ask to have the reporter copy this into the record hereafter.

By R. E. DAGGS: We object to the introduction of the deed, because it is not an instrument purporting to have any bearing upon the issues in this case, and it is immaterial, incompetent, and irrelevant.

(Objection overruled, and defendants except.)

Defendant A. J. Daggs makes the same objection. Same ruling by the court and exception taken.

By Mr. ARMSTRONG: Plaintiff rests.

Defense.

By Mr. A. J. DAGGS: Defendants move for judgment on the showing in this case by plaintiff.

(Counsel for defendant reads motion from paper and argues the motion to the court.)

R. E. Daggs, Esq., thereupon argued his motion for a judgment to the court; which motions were then and there denied by the court.

The court remarking: Is there any testimony on the part of the defendant?

By A. J. DAGGS, Esq.: No, sir.

By R. E. DAGGS, Esq.: No, sir.

(Case closed.)

60 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. JOHNS, and A. J. DAGGS, Defendants. } No. 2327.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

I, Chas. H. Holmes, court reporter of the third judicial district of the Territory of Arizona, do hereby certify that I was in attendance at the trial of the above entitled cause in the district court of the county of Maricopa, Territory of Arizona, on the 21st day of December, A. D. 1896; that I was the duly appointed and acting court reporter of said court on said day and am now; that as such court reporter, by agreement of the parties to this cause and under the direction of the court at the trial, I reported phonographically the proceedings and all of the oral evidence adduced and filed the documentary evidence offered on the trial of said cause with the clerk of said court as the evidence in said cause.

That I have this day transcribed all of my said shorthand notes of the evidence and proceedings taken upon the trial of said cause, including the objections of counsel, the rulings by the court, and the exceptions to said rulings in the manner and at the times
61 as therein noted; and I hereby certify the foregoing transcript of twenty-one pages of typewritten matter to contain a full, true, correct, and complete statement of the said proceedings and all of the oral evidence offered and admitted in said cause, and that no other evidence was therein introduced.

In testimony whereof I, as such court reporter, here*by* set my official hand on this 29th day of December, A. D. 1897.

CHAS. H. HOLMES,
Official Court Reporter,
Third Judicial District of the Territory of Arizona.

Done at Phœnix, A. T.

PL'FF'S EX. B.

John S. Armstrong to Robert E. Daggs. } 4428.

Warranty Deed.

DEC. 18, 1893.

This indenture made this 18th day of December A. D. 1893 between John S. Armstrong of the town of Tempe A. T. the party of the first part and Robert E. Daggs of Chicago State of Illinois the party of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of eleven thousand (11,000) dollars to him in hand paid by said party of the second

part does by these presents grant, bargain, sell and convey unto said party of the second part and to his heirs and assigns forever
62 that certain real property situated, lying and being in Maricopa county, Territory of Arizona, described as follows, to wit: All that portion of the northeast quarter (N. E. ¼) of section twenty-one (21) of township one (1) north range four (4) east Gila and Salt River base and meridian bounded on the north by Eight street and on the east by Farmer avenue as laid out on a map of the town of Tempe, recorded in Book 2 page 26 of maps in the office of the recorder of said Maricopa county—excepting therefrom the following-described tracts of land: 1st. Forty acres commencing its boundaries at a point on the south boundary line of said quarter section in the center of Farmer avenue, running thence west eighty (80) rods; thence north eighty (80) rods; thence east eighty (80) rods; thence south eighty (80) rods along the center of Farmer avenue to the place of beginning.

2d. A lot of land belonging to Edward A. Murphy beginning at a point in the center of Eight street two hundred and forty-two and one-half (242½) feet west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen (115) feet to a post; thence west two hundred and thirty-six (236) feet to a post, thence north one hundred and fifteen (115) feet to the center of Eight street, thence along the center of Eight St. two hundred and thirty-six (236) feet to the place of beginning.

3d. A lot of land belonging to Walter S. Johnson beginning at a stake at the northeast corner of the lot now owned by Edward A. Murphy as above described, running thence west along the
63 south boundary line of Eight street six hundred and twenty-nine and four-tenths (629.4) feet to a point being the northeast corner of the land hereby excepted; thence south one hundred and forty-two (142) feet; thence west one hundred and thirty-seven and three-tenths (137.3) feet; thence north one hundred and forty-two (142) feet; thence east one hundred and thirty-seven and three-tenths (137.3) feet to the northeast corner of the lot hereby excepted. The land hereby conveyed containing one hundred and eleven (111) acres more or less, together with a *pro rata* of share number sixty-six (66) in the Tempe irrigating canal and water represented thereby, also a *pro rata* of share number two (2) in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigating canal.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto said Robert E. Daggs, his heirs and assigns forever. The said Robert E. Daggs hereby assumes the payment of, and agrees to pay two certain promis-ory notes each for the sum of three thousand two hundred and fifty (3,250) dollars, executed by said John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson his wife and secured by a mortgage of the same date as said notes on the land hereby conveyed.

And the said John S. Armstrong binds himself, his heirs, executors and administrators to warrant and forever defend all
64 and singular the said premises unto the said Rob't E. Daggs his heirs and assigns against every person whomsoever lawfully claiming the same or to claim the same or any part thereof.

In witness whereof said party of the first part has hereunto set his hand and seal the day and year first above written.

JNO. S. ARMSTRONG. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, W. L. Van Horn, a notary public in and for said county and Territory, on this day personally appeared John S. Armstrong, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this eighteenth day of December, A. D. 1893.

[NOTARY SEAL.] W. L. VAN HORN,
Notary Public.

RECORDER'S OFFICE, PHOENIX, MARICOPA CO., A. T.

Filed and recorded, at request of the Bank of Tempe, Dec. 19, 1893, at 8.10 a. m., Book 35, Deeds, pages 268, 269, & 270.

NERI OSBORN,
County Recorder.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, Neri Osborn, county recorder in and for county and
65 Territory aforesaid, do hereby certify that the within instrument was filed for record at 8.10 o'clock a. m. on this 19th day of Dec., 1893; recorded in Book No. 35 of Deeds, records of Maricopa county, Arizona, at pages 268, 269, & 270.

Witness my hand and official seal the day and year above written.

[RECORDER'S SEAL.] NERI OSBORN,
County Recorder,
By WM. E. THOMAS. *Deputy.*

Ex. filed Dec. 21st, 1896. J. E. Walker, clerk. Certified copy of deed, R. E. Daggs to A. L. Johns. Plaintiff's Exhibit B. Filed Jan. 10, 1898. Edwin S. Gill, clerk.

Warranty Deed.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Know all men by these presents that I, R. E. Daggs of the city of Chicago county of Cook, State of Illinois for and in consideration of eleven thousand five hundred dollars ($11,500.00) to me in hand paid by A. L. Johns of Chicago, county of Cook, State of Illinois,

have granted sold and conveyed and by these presents do grant sell and convey unto the said A. L. Johns all that certain premises described as follows, viz:

All that portion of the northeast quarter (N. E. ¼) of section twenty-one (21) of township one (1) north range four (4) east Gila and Salt River base and meridian bounded on the north by Eight street and on the east by Farmer's avenue, as laid out on a map of the town of Tempe recorded in Book Two (2) page 26 of maps in the office of the recorder of deeds of said Maricopa county excepting therefrom the following-described tract of land to wit:

66

1st. Forty acres commencing its boundaries at a point on the south boundary line of said quarter section in the center of Farmer's avenue, running thence west eighty rods (80) thence north eighty (80) rods, thence east eighty (80) rods, thence south eighty (80) rods, along the center of Farmer's avenue to the place of beginning.

2nd. A lot of land belonging to Edward A. Murphy beginning at a point in the center of Eight street two hundred & forty-two & one-half (242½) feet west from the center of the Maricopa and Phœnix Railroad track running thence south one hundred and fifteen (115) feet to a post thence west two hundred and thirty-six (236) feet to a post, thence north one hundred and fifteen (115) feet to the center of Eight street, thence along the center of Eight street two hundred and thirty-six (236) feet to the place of beginning.

3d. A lot of land belonging to Walter S. Johnstone beginning at a stake at the northeast corner of the lot now owned by Edward A. Murphy as above described, running thence west along the south boundary line of Eight street six hundred and twenty-nine and four-tenths (629.4) feet to a point being the northeast corner of the land hereby excepted, thence south one hundred and forty-two (142) feet thence west one hundred & thirty-seven and three-tenths (137.3) feet, thence north one hundred & forty-two (142) feet, thence east one hundred and thirty-seven & three-tenths feet (137.3) to the northeast corner of the lot hereby excepted. The land hereby conveyed containing one hundred & eleven (111) acres more or less, together with a *pro rata* of share number sixty-six (66) in the Tempe irrigating canal and water represented thereby, also a *pro ratae* of share number two (2) in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigating canal. The said A. L. Johns buys the herein described lands with full knowledge of the now existing James Wilson & Desda A. Wilson mortgage of six thousand five hundred dollars and hereby assumes & agrees to pay the same.

67

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said A. L. Johns, heirs and assigns forever, and I hereby bind myself my heirs executors and administrators to warrant and ever defend all and singular the premises unto the said A. L. Johns, except the Wilson mortgage mentioned herein, heirs

and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, and the parties herein further agree that this contract is made under the statutes of Arizona Territory now in force & that said statute shall govern the construction of this deed.

68 Witness my hand this seventeenth day of March, 1894.

R. E. DAGGS. [SEAL.]

Delivered in the presence of—

——— ———.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Before me, E. M. Doe, a notary public in and for said county of Coconino, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and further declares himself to be single and unmarried.

Given under my hand and seal of office this seventeenth day of March, A. D. 1894.

[SEAL.]

E. M. DOE,
Notary Public.

Filed and recorded, at request of Bank of Tempe, Apr. 28, 1894, at 8.30 a. m.

NERI OSBORN,
County Recorder.
By H. C. MEADOR, *Deputy.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, F. W. Sheridan, county recorder in and for said county, do hereby certify that I have compared the above and foregoing with and the same is a full, true, and correct copy of deed, as the same appears of record in Book 36 of Deeds, pages 110, 111, and 112, records of Maricopa county, Arizona.

69 In witness whereof I have hereunto set my hand and affixed my official seal this 10th day of January, A. D. 1898.

[RECORDER'S SEAL.]

F. W. SHERIDAN,
County Recorder.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG, ROBERT E. DAGGS, Defendants.

Complaint. Filed April 26th, 1894, at 3.30 p. m.

The complaint of the plaintiff, who appears herein by Thomas Armstrong, Jr., his attorney, respectfully shows to the court and

alleges that the plaintiff, James Wilson, is a resident of town of Palatine, in the county of Cook, State of Illinois; that the defendants, John S. Armstrong and Robert E. Daggs, are residents of and reside in the county of Maricopa, in the Territory of Arizona.

That heretofore, to wit, on the 24th day of April, 1893, at the city of Phœnix, in the Territory of Arizona, the said defendant, John S. Armstrong, did make, execute, and for value deliver to this plaintiff his two certain promissory notes; which said notes are in words and figures as follows, to wit:

No. 1. PHŒNIX, ARIZONA, *April 24th*, 1894.

On or before the 24th day of April, A. D. 1894, without grace, for value received, I promise to pay to the order of James Wilson,
70 at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred fifty dollars in United States gold coin, with interest thereon, at the rate of eight per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00.

(Signed) JOHN S. ARMSTRONG.

No. 2. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the 24th day of April, A. D. 1895, without grace, for value received, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred fifty dollars in United States gold coin, with interest thereon, at the rate of eight per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00.

(Signed) JOHN S. ARMSTRONG.

That at the time and on the date of the making of said notes aforesaid, and for the purpose of securing the payment of the same, with interest, as mentioned therein, said defendant, John S. Armstrong, made, executed, and delivered to this plaintiff a mortgage wherein and whereby the said defendant, John S. Armstrong, bargained, sold, and conveyed to this plaintiff the following-described real estate, situate in the county of Maricopa and Territory of Arizona, namely, the northeast quarter (¼) of section numbered twenty-one (21), township one (1) north of range four (4) east of the Gila and Salt River base and meridian, county of Maricopa, Territory of Arizona, except one strip of land off the east side of said quarter (¼) section thirty feet (30) in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said
71 railroad company for right of way purposes, except all of that portion of said quarter section (¼) which has been heretofore known as Farmers' addition to the town of Tempe, and except forty acres (40) of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at a point on the south boundary line of said quarter (¼) section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty

(80) rods, thence north eighty (80) rods, thence east eighty (80) rods, thence south eighty (80) rods along the center of the street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter (¼) section belonging to Edward A. Murphy, and particularly described as follows, to wit: Commencing at a point in the center of Eight- street two hundred forty-two and one-half feet (242½ feet) west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred fifteen feet (115) to a post, thence west two hundred and thirty-six feet (236) to a post, thence north one hundred and fifteen feet (115) to the center of said Eighth street, thence along the center of said Eighth street two hundred and thirty-six feet (236) to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone, and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), running thence west along
the south boundary line of Eighth street six hundred twenty-
72 nine and four-tenths feet (629.4) to a point, being the north-
east corner of the land hereby excepted, thence south one hundred forty-two feet (142), thence west one hundred thirty-seven and three-tenths feet (137.3), thence north one hundred forty-two feet (142), thence east one hundred thirty-seven and three-tenths feet (137.3 feet) to the northeast corner of the land hereby excepted.

Also *pro rata* of share number (66) sixty-six in the Tempe irrigating canal and water represented thereby; also a *pro rata* of share number two in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigating canal.

And such conveyance was conditioned that if said John S. Armstrong, his heirs, executors, or administrators, should pay or cause to be paid to this plaintiff, his heirs, executors, administrators, or assigns, the two promissory notes above set forth, with interest thereon, as in said notes provided, and also pay annually the taxes assessed on said premises and keep the buildings thereon insured for the benefit of this plaintiff, then said instrument and conveyance should be void.

And it was further stipulated and agreed in and by said mortgage that if the interest on said promissory notes or the principal thereof should not be punctually paid when the same should become due as in said promissory notes mentioned, or should default be made
in any of the conditions of said mortgage, then and in such
73 case the whole principal sum of said notes and the interest
thereon should be deemed and taken to be wholly due and payable and proceedings forthwith had by this plaintiff, his heirs, executors, or assigns, for the recovery of the principal sum of said notes, with interest thereon, by suit on said notes or by foreclosure of said mortgage; and it was further stipulated and agreed in and by said mortgage that in case any suit or other proceedings were had for the recovery of the said principal sum and interest there should

be included in the judgment that might be recovered attorneys' fees, not exceeding ten per cent. upon the amount found due the plaintiff on said notes and mortgage, or in case of settlement after suit brought, but before judgment is rendered, then ten per cent. of the amount found due at the time of settlement, as well as all payments that this plaintiff might be obliged to make for his security or on account of any taxes, charges, incumbrances, assessments whatsoever on said premises legally laid or made thereon.

That said notes were given and said mortgage executed and delivered for the purpose of paying and as part payment of the purchase-money of said premises above described; that said mortgage was duly acknowledged and certified so as to be entitled to record, and was, on the first day of May, 1893, duly recorded in the office of the county recorder for Maricopa county, Arizona Territory, in Book 16 of Mortgages, on pages 257 to 260 thereof, inclusive.

The plaintiff further shows to the court and alleges that the said John S. Armstrong, one of the defendants above named, afterward and on the eighteenth day of December, 1893, sold and con-
74 veyed the land and premises above described and in said mortgage described to the defendant Robert E. Daggs by a deed of conveyance in writing made and executed by said John S. Armstrong on said 18th day of December, 1893, and said defendant, Robert E. Daggs, accepted said deed of conveyance and thereupon and thereby agreed and bound himself, his heirs, executors, administrators, and assigns, to pay or cause to be paid to this plaintiff the aforesaid notes and mortgage securing the same, and said defendant, Robert E. Daggs, thereupon entered into possession of said premises and is now in possession thereof.

The plaintiff further shows to the court that said John S. Armstrong and said Robert E. Daggs, the defendants above named, have refused and neglected to pay the second installment of interest upon said notes, which became due and payable on the 24th day of April, 1894, and have also refused and neglected to pay the principal of the first of said notes, which became due and payable on the 24th day of April, 1894.

That demand has been made by this plaintiff at the place of payment stipulated in said notes for the payment of said principal sum and interest as aforesaid by them upon the day the same became due and upon the following day, and neither said principal sum nor any part thereof nor of said interest was paid, and this plaintiff thereupon, on the 25th day of April, 1894, declared the whole of said principal sums upon both of said notes to be due and payable forthwith according to the terms and conditions of said mortgage, and did thereupon, on said 25th day of April,
75 1894, demand payment thereof from defendants, but defendants have not paid the same nor any part thereof.

That the plaintiff further shows that he is the lawful owner and holder of said notes and mortgage, and that there is now due and payable to him from said defendants, John S. Armstrong and Robert E. Daggs, thereon the principal sum of six thousand five hun-

dred dollars ($6,500.00), with interest thereon, at the rate of eight per cent. per annum, from the twenty-fourth day of October, 1893.

Wherefore the plaintiff prays judgment against said defendants, John S. Armstrong and Robert E. Daggs, for the sum of six thousand five hundred dollars ($6,500.00), with interest thereon, at the rate of eight per cent. per annum, since the 24th day of October, 1893, together with ten per cent. of the amount due upon said notes as attorneys' fees, besides the costs of this action, and that plaintiff's mortgage lien on said premises and property described in the mortgage above specified be foreclosed and an order of sale be issued out of said court, directed to the sheriff of said county, commanding him to seize and sell said property as under execution in payment and satisfaction of said judgment, and that said defendants and all persons claiming under them subsequent to the execution of said mortgage upon said premises be barred and foreclosed of all right, claim, and title in and to said premises and property and every part thereof.

And that the plaintiff may have such other and further relief as in equity he may be entitled to.

THOS. ARMSTRONG, JR.,
Attorney for the Plaintiff.

76 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS ET AL., Defendant-. } Memorandum of Costs and Disbursements. Filed Jan. 10th, 1898.

Disbursements.

Clerk's fees	$14.40
Stenographer's fees	12.00

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs, being duly sworn, deposes and says that he is agent for the def'ts in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said def'ts.

That the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

R. E. DAGGS.

Subscribed and sworn to before me this 10 day of Jan., 1898.

EDWIN S. GILL, *Clerk.*
[DISTRICT COURT SEAL.]

77 *Summons.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG and ROBERT E. DAGGS, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court. (Issued April 26, 1894.) (Filed April 27th, 1894.)

In the name of the Territory of Arizona, to John S. Armstrong and Robert E. Daggs, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 26th day of April, A. D. 1894.

[DISTRICT COURT SEAL.] J. E. WALKER,
Clerk of said District Court.

78 OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 26th day of April, A. D. 1894, at the hour 3.50 p. m., and personally served the same on the 26th & 27th day of April, A. D. 1894, on John S. Armstrong and Robert E. Daggs, being the defendants named in said summons, by delivering to John S. Armstrong on the 26th, at Phœnix, and Robert E. Daggs on the 27th, at Tempe, county of Maricopa, A. T., a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 27th day of April, A. D. 1894.

J. K. MURPHY, *Sheriff*,
By W. WIDMER,
Deputy Sheriff.

Fees.

Service	$3.00
Copies, 2	1.20
Travel, 10 miles	3.00
Total	$7.20

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa, May Term, 1894.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG and ROBERT E. Daggs, Defendants.

Judgment. Filed May 8, 1894, at 11 a. m.

This cause coming on to be heard before the court on this 8th day of May, A. D. 1894, and the default of the defendants and both of them to appear, answer, or demurrer herein having been
79 duly entered and the plaintiff having produced to the court evidence to sustain the cause of action set forth in the complaint, and the court being fully and sufficiently advised of and concerning the premises and having fully considered the matter:

Now, on motion of Thomas Armstrong, Jr., attorney for the plaintiff, it is therefore ordered, decreed, and adjudged that the plaintiff, James Wilson, have and recover of and from the defendant John S. Armstrong the sum of $6,780.28, the principal and interest due on the notes described in the complaint, together with the sum of $350.00 as and for attorney's fees, together with $24.80 costs of suit, amounting in all to the sum of $7,155.08, with interest on the principal sum of $6,500.00, from the date hereof until paid, at the rate of eight per cent. per annum, and with interest on the balance of this judgment, at the rate of seven per cent. per annum, until paid.

It is further ordered, adjudged, and decreed that the said total sum of $7,155.08, with interest as aforesaid, is a lien upon the lands and property hereinafter described and is and has been such lien from and since the date 24th day of April, 1893, the date of the mortgage described in the plaintiff's complaint, and the said lien and the mortgage described in the plaintiff's complaint are hereby foreclosed.

It is further ordered, adjudged, and decreed that an order of sale be issued by the clerk of this court directed to the sheriff of Maricopa county, Arizona Territory, commanding him to seize and sell the said real estate, water rights, and rights of way and sell
80 the same as under execution in satisfaction of such judgment, with costs and accruing costs, and that he apply the proceeds in satisfaction of said amount; and if said property shall sell for more than sufficient to pay off and satisfy said judgment, with interest and costs of sale, then the said sheriff is directed to pay over the excess to the defendants, but if the proceeds of such

sale be insufficient to satisfy the said judgment, with costs and interest as aforesaid, then said sheriff shall make the balance out of any other property of the defendant John S. Armstrong, as in case of ordinary execution.

It is further ordered, adjudged, and decreed that the said sheriff, after the expiration of six months from the date of such sale, make and execute to the purchaser or purchasers of said property or their assigns a proper and sufficient deed or deeds thereof, and that the defendants and all persons having liens subsequent to said mortgage, and all persons claiming to have acquired any estate or interest in said pre-ises subsequent to the filing of the notice of the pendency of this action in the office of the county recorder of Maricopa county, Arizona, on the 11th day of March, 1894, be forever barred and foreclosed of and from all equity of redemption and claim in and to said mortgaged premises and every part thereof from and after the expiration of said six months from the date of said sale.

The description of the mortgaged premises and property to be sold under and by virtue of this decree is as follows:

81 That certain piece and parcel of land lying and being in the county of Maricopa and Territory of Arizona, to wit: The northeast quarter of section numbered twenty-one (21), township one (1) north of range four (4) east of the Gila and Salt River base and meridian, county of Maricopa, Territory of Arizona, except one strip of land off the east side of said quarter (¼) section thirty feet (30) in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said railroad company for right of way purposes, except all of that portion of said quarter section (¼) which has been heretofore known as Farmers' addition to the town of Tempe; and except forty acres (40) of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at a point on the south boundary line of said quarter (¼) section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty rods, thence north eighty rods, thence east eighty rods (80), thence south eighty rods (80) along the center of the first street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Edward A. Murphy, and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred forty-two and one-half feet (242½ feet) west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen feet to a post, thence west two hundred and thirty-six feet to a post, thence north one hundred and fifteen feet to the center of said

82 Eighth street, thence along the center of said Eighth street two hundred and thirty-six feet (236) to the place of beginning; except the lot or parcel of ground in said quarter section belonging to Ealter S. Johnstone, and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), running thence west along the

south boundary line of Eighth street six hundred twenty-nine and four-tenths feet to a point, being the northeast corner of the land hereby excepted; thence south one hundred forty-two feet, thence west one hundred and thirty-seven and three-tenths feet, thence north one hundred and forty-two feet, thence east one hundred and thirty-seven and three-tenths feet to the northeast corner of the land hereby excepted.

Also *pro rata* of share number sixty-six in the Tempe irrigating canal and water represented thereby; also a *pro rata* of share number two in the McKinney and Kirkland ditch and the right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six in said Tempe irrigating canal.

Done in open court this 8th day of May, 1894.

By the court:

A. C. BAKER.

83 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff, *vs.* JOHN S. ARMSTRONG and R. E. DAGGS, Defendants.	Order of Sale. Received at 4.20 o'clock p. m., May 12, 1894. Filed June 22, 1894.

The Territory of Arizona to the sheriff of Maricopa county, Greeting:

Whereas, on the 8th day of May, 1894, James Wilson recovered a judgment in the district court of Maricopa county, Arizona, against John S. Armstrong and Robert E. Daggs for the sum of $7,155.08, with interest from said 8th day of May, on $6,500.00 of said sum until paid at the rate of eight per cent. per annum, and with interest on the balance of said sum, to wit, $655.08, at the rate of 7 per cent. per annum, until paid, with a foreclosure of the mortgage lien of the said James Wilson on the following-described real estate in Maricopa county, Arizona, to wit:

That certain piece and parcel of land lying and being in the county of Maricopa and Territory of Arizona, to wit:

The northeast quarter of section numbered twenty-one (21), township one (1) north of range four east of the Gila and Salt River base and meridian, county of Maricopa, Territory of Arizona, except one strip of land off the east side of said quarter sec-
84 tion thirty feet in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said railroad company for right of way purposes, except all of that portion of said quarter section which has been heretofore known as Farmers' addition to the town of Tempe, and except forty acres of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at a point on the south boundary line of said quarter section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west

eighty rods, thence north eighty rods, thence east eighty rods, thence south eighty rods along the center of the first street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Edward A. Murphy, and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred forty-two and one-half feet west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen feet to a post, thence west two hundred and thirty-six feet to a post, thence north one hundred and fifteen feet to the center of the said Eighth street, thence alond the center of the said Eighth street two hundred and thirty-six feet to the place of beginning; except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone, and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), running thence west along the south boundary line
85 of Eighth street six hundred twenty-nine and four-tenths feet to a point, being the northeast corner of the land hereby excepted, thence south one hundred and forty-two feet, thence west one hundred thirty-seven and three-tenths feet, thence north one hundred and forty-two feet, thence east one hundred and thirty-seven and three-tenths feet to the northeast corner of the land hereby excepted;

Also a *pro rata* of share number sixty-six in the Tempe irrigating canal and water represented thereby; also a *pro rata* of share number two in the McKinney and Kirkland ditch and the right of way through all lateral ditches to the land above described for the water represented by said *pro rata* of share number sixty-six in said Tempe irrigating canal;

As said lien existed on the 24th day of April, 1893, and that said property be sold as on execution to satisfy said judgment:

Therefore you are hereby commanded that you seize the above-described property and sell the same as under execution, and should the proceeds of said sale be insufficient to satisfy said judgment, with interest and costs of sale, then that you make the balance out of any other property of said John S. Armstrong as in case of ordinary execution.

Hereof fail not, and have you the said moneys, together with this writ, showing how you have executed the same, before the court aforesaid, at the court-house, in the city of Phœnix, within sixty days after the receipt hereof.

Witness the Hon. A. C. Baker, judge of said court, at the
86 court-house, in the city of Phœnix, county of Maricopa and Territory of Arizona, this 12th day of May, 1894.

Attest my hand and the seal of said court the day and year last above written.

[DISTRICT COURT SEAL.] J. E. WALKER, *Clerk.*

OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

By virtue of the within order of sale, I have this day levied on all the right, title, claim, and interest of the therein-named defendant in and to the therein-described real estate.

Dated May 12, 1894.

J. K. MURPHY, *Sheriff*,
By FRANK M. KING,
Deputy Sheriff.

OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

I, J. K. Murphy, sheriff of Maricopa county, do hereby certify that by virtue and in pursuance of the annexed order of sale I advertised the property described as follows to wit: The northeast quarter of section numbered twenty-one (21), township one (1) north of range four east of the Gila and Salt river base, and meridian, county of Maricopa, Territory of Arizona, except one strip of land off the east side of said quarter section thirty feet in width from the center of the
87 Maricopa and Phœnix Railroad track heretofore deeded to said railroad company for right-of-way purposes, except all of that portion of said quarter section which has been heretofore known as Farmers' addition to the town of Tempe, and except forty acres of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at a point on the south boundary line of said quarter section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty rods; thence north eighty rods; thence east eighty rods; thence south eighty rods along the center of the first street above mentioned to the place of beginning, and except the lot or parcel of ground in said quarter section belonging to Edward A. Murphy and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred forty-two and one-half feet west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen feet to a post; thence west two hundred and thirty-six feet to a post; thence north one hundred and fifteen feet to the center of the said Eighth street; thence along the center of the said Eighth street two hundred and thirty-six feet to the place of beginning, except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section, as above described, running thence west along the
88 south boundary line of Eighth street six hundred twenty-nine and four-tenths feet to a point, being the northeast corner of the land hereby excepted; thence south one hundred and forty-two feet; thence west one hundred thirty-seven and three-tenths feet; thence north one hundred and forty-two feet; thence east one hundred and thirty-seven and three-tenths feet to the northeast corner of the land hereby excepted; also a *pro rata* of

share number sixty-six in the Tempe irrigating canal and water represented thereby; also a *pro rata* of share number two in the McKinney and Kirkland ditch and the right of way through all lateral ditches to the land above described for the water represented by said *pro rata* of share number sixty-six in said Tempe irrigating canal, as said lien existed on the 24th day of April, 1893, and that said property be sold as on execution to satisfy said judgment, to be sold by me in front of the court-house door in the city of Phœnix, county of Maricopa, Arizona, on the 6th day of June, 1894, at 2 o'clock p. m.; that previous to said sale I posted printed notice, particularly describing the property, for twenty-one days, in three public places of the city of Phœnix, one of which was at the court-house door, and also caused due and legal notice thereof to be published once a week for the same period preceeding said sale in the Arizona Gazette, a newspaper printed and published in the county of Maricopa, and that on Wednesday, the 6th day of June, 1894, the day on which said real property was so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and offered said real property for sale at public auction to the
89 highest bidder according to law, and sold the same to James Wilson for the sum of seven thousand four hundred forty-four ($7,444) dollars, he being the highest and best bidder, and said sum being the highest amount bid for the said property, and which amount I acknowledge to have received, and that I delivered to said purchaser a certificate of said sale and filed a duplicate thereof in the office of the county recorder of the said Maricopa county.

And I further certify that I deducted from the said sum of $7,444 my fees, commissions, and expenses, amounting to the sum of $253.90, leaving a net balance of $7,190.10, which net balance I have paid over to plaintiff's attorney, whose receipt therefor is hereto attached, and I herewith return this writ partially satisfied in the sum of $7,190.10, there still remaining due and unpaid on said judgment, interest, and costs the sum of $9.50.

Dated June 6, 1894.

J. K. MURPHY, *Sheriff*,
By FRANK M. KING,
Deputy Sheriff.

($7,190.10.) PHŒNIX, A. T., *June* 6, 1894.

Received from J. K. Murphy, sheriff of Maricopa county, Arizona, the sum of $7,190.10, amount of sale in the case of James Wilson *vs.* John S. Armstrong, after deducting sheriff's fees, commissions, and costs.

THOS. ARMSTRONG, JR.,
Att'y for Jas. Wilson, Pl'ff.

90 *Mortgage.*

Know all men by these presents: That I, John S. Armstrong, mortgagor, of the town of Tempe, county of Maricopa, Territory of Arizona, for and in consideration of six thousand five hundred

($6,500.00) dollars, to me in hand paid by James Wilson, of the town of Palatine, county of Cook, State of Illinois, mortgagee, have granted, sold, and conveyed, and by these presents do grant, sell and convey unto the said James Wilson all that certain premises described as follows, to wit:

The northeast quarter (¼) of section numbered twenty-one (# 21), township one (1) north, range four (4) east, Gila & Salt River base and meridian, county of Maricopa, Territory of Arizona, except a strip of land off the east side of said quarter (¼) section thirty (30) feet in width from the center of the Maricopa & Phœnix Railroad track heretofore deeded to said railroad company for right-of-way purposes; except all of that portion of the said quarter (¼) section which has been heretofore known as Farmers' addition to the town of Tempe, except lots one (1), eight (8) and nine (9), block one (1) and lot five (5) block two (2) in said Farmers' addition which said lots are hereby conveyed to the said James Wilson, and except forty (40) acres of land in the southeast part of said quarter (¼) section being particularly described as follows to wit: Commencing at a point on the south boundary line of said quarter (¼) section in
91 the center of the first street west of the Maricopa & Phœnix Railroad track, running thence west eighty (80) rods, thence north eighty (80) rods, thence east eighty (80) rods, thence south eighty (80) rods along the center of the street above mentioned to the place of beginning, and except the lot or parcel of ground in said quarter (¼) section belonging to Edward A. Murphy and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred forty-two and one-half (242½) feet west from the center of the Maricopa & Phœnix Railroad track, running thence south, one hundred fifteen (115) feet to a post, thence west two hundred thirty-six (236) feet to a post, thence north one hundred fifteen (115) feet to the center of said Eighth street, thence along the center of Eighth street two hundred thirty-six (236) feet to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter (¼) section (as above described) running thence west along the south boundary line of Eighth street six hundred twenty-nine and four-tenths (629.4) feet to a point being the northeast corner of the land hereby excepted, thence south one hundred forty-two (142) feet, thence west one hundred thirty-seven and three-tenths (137.3) feet, thence north one hundred forty-two (142) feet, thence east one hundred thirty-seven and three-tenths (137.3) feet to the northeast corner of the land hereby excepted;

Also a *pro rata* of share number sixty-six (66) in the Tempe
92 irrigating canal and the water represented thereby, also a *pro rata* of share number two (2) in the McKinney and Kirkland ditch and right or way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigating canal;

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said James Wilson, his heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of two (2) certain promissory notes, given by said John S. Armstrong of date April twenty-fourth, 1893; which said notes — in words and figures following, to wit:

No. 1. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the twenty-fourth day of April, A. D. one thousand eight hundred ninety-four, without grace, for value received, I promise to pay to the order of James Wilson at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred & fifty dollars, in U. S. gold coin, with interest thereon at the rate of eight (8) per cent. per annum from date until paid. Interest payable semi-annually.

$3,250.00.

(Signed) JOHN S. ARMSTRONG.

No. 2. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the twenty-fourth day of April, A. D. one thousand eight hundred ninety-five, without grace, for value received, I promise to pay to the order of James Wilson at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred & fifty dollars, in U. S. gold coin, with interest thereon at the rate of eight (8) per cent. per annum from date until paid. Interest payable semi-annually.

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$3,250.00.

(Signed) JOHN S. ARMSTRONG.

The two (2) notes above described and this mortgage are given in part payment of the purchase price of said land and shares of canal stock hereinbefore described. The said mortgageor agrees to keep the buildings on said premises insured in some responsible insurance company, approved by J. W. Evans and for the benefit of said James Wilson in a sum not less than twenty-five hundred ($2,500.00) dollars; and in case of failure to do so, the said mortgagee may insure said premises, and the premium paid therefor shall be paid by said mortgageor, and until so paid shall be added to and form a part of the principal sum secured hereby and shall draw interest at the rate of two (2) per cent. per month until paid; and any insurance money secured under the provisions hereof shall, at the option of the mortgagee, be applied towards the payment of either principal or interest, or both, or the mortgagee may hold such money as collateral security for the payment of the debt hereby secured, until this mortgage is satisfied and discharged; and the said mortgageor agrees to keep all buildings and other improvements on said premises in as good condition and repair as they are

now in at this date, and to permit no waste until the debt
94 hereby secured is fully paid; and this instrument shall be void if said promissory notes, principal and interest, be well and truly paid when due, according to the tenor and effect thereof, and all other obligations on this mortgage discharged.

But it is distinctly understood and agreed that if the interest on said promissory notes, or the principal thereof shall not be punctually paid when the same shall become due as in said promissory notes mentioned, or should default be made in any of the conditions of this mortgage, then, and in such case, the principal sum of said notes and the interest thereon, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee, James Wilson, his heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said notes, or on this mortgage and notes; and in any suit or other proceedings that may be had for the recovery of said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns to include in the judgment that may be recovered, attorney's fees not exceeding ten (10 %) per cent. thereon upon the amount found due the plaintiff on said notes and this mortgage, or in case of settlement after suit is brought but before judgment is rendered, then ten (10 %) per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee, his heirs, executors, administrators or assigns may be obliged to make for his security or on account of any taxes, charges, encumbrances or assessments whatsoever on said premises, legally laid or made thereon.

95 Witness my hand this twenty-fourth day of April, in the year of our Lord eighteen hundred ninety-three.

JNO. S. ARMSTRONG. [SEAL.]

Signed, sealed, and delivered in the presence of—
O. A. TURNEY.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, O. A. Turney, a notary public in and for said county of Maricopa, on this day personally appeared John S. Armstrong, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 29th day of April, 1893.

[NOTARY SEAL.]

O. A. TURNEY,
Notary Public.

RECORDER'S OFFICE, PHOENIX, MARICOPA CO., A. T.

Filed and recorded at request of J. W. Evans, May 1, 1893, at 9.30 a. m., Book 16, Mortgages, pages 257 to 260, inc.

NERI OSBORNE,
County Recorder,
By WM. E. THOMAS, *Deputy.*

TERRITORY OF ARIZONA, }
County of Maricopa. }

96 I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 9.30 o'clock a. m. on this 1st day of May, 1893, and duly recorded in Book No. 16 of Mortgages, records of Maricopa county, Arizona, at pages 257 to 260, inc.

Witness my hand and official seal the day and year above written.

NERI OSBORN,
County Recorder.
By WM. E. THOMAS, *Deputy.*

[RECORDER'S SEAL.]

Filed May 8th, 1894.

J. E. WALKER, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

Promissory Notes.

No. 1. #1606. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the twenty-fourth day of April, A. D. one thousand eight hundred and ninety-four, without grace, for value received, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred & fifty dollars in U. S. gold coin, with interest thereon, at the rate of eight (8) per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00. JNO. S. ARMSTRONG.

97 Endorsement on back of note.

Palatine, Oct. 24, 1893.—Received interest on the within note to date.

3,250.	8%, Oct. 24 to May 8,
140.14	6 mo. 14 da.
3,390.14	
3,390.14	
$6,780.28	total.
$350	att'y.

Filed May 8th, 1894. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

No. 2. PHŒNIX, ARIZONA, *April 24th*, 1893.

On or before the twenty-fourth day of April, A. D. one thousand eight hundred and ninety-five, without grace, for value received, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phœnix, Arizona, three thousand two hundred & fifty dollars in U. S. gold coin, with interest thereon, at the rate of eight (8)

per cent. per annum, from date until paid, interest payable semi-annually.

$3,250.00. JNO. S. ARMSTRONG.

Palatine, Oct. 24, 1893.—Received interest on the within note to date.

Filed May 8th, 1894.

J. E. WALKER, *Clerk*,
By C. H. KNAPP,
Deputy Clerk.

98 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG and R. E. Daggs, Defendants.

1954. Memorandum of Costs and Disbursements. Filed May 10th, 1894.

Disbursements.

Sheriff's fees	$7.20
Clerk's fees	16.60
Recorder fees, filing notice, *lis pendens*	1.00
	$24.80

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss:*

Thos. Armstrong, Jr., being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff.

That the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

THOS. ARMSTRONG, JR.

Subscribed and sworn to before me this 10 day of May, 1894.
J. E. WALKER, *Clerk*,
By C. H. KNAPP, *Deputy*.

99 In the District Court, Third Judicial District, of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
against
JOHN S. ARMSTRONG and ROBERT E. DAGGS, Defendants.

I, the undersigned, clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, do hereby certify the foregoing to be a true copy of the judgment entered in

the above-entitled action and recorded in Judgment Book D of said court, at page 280.

And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and seal of the district court this 8 day of May, A. D. 1894.

[DISTRICT COURT SEAL.]

J. E. WALKER, *Clerk*,
By LEWIS JORDAN,
Dep'y Clerk.

100 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS, W. A. DAGGS, A. J. Daggs, R. E. Daggs, Defendants.

Motion by Def'ts for Judgment. Filed Dec. 21st, 1896.

Comes defendants, by attorney, A. J. Daggs, and moves the court to render judgment for defendants and each of them for the reasons:

I.

Because the evidence introduced by plaintiff is not sufficient to warrant the relief prayed by plaintiff.

II.

Because there is no evidence sustaining the allegations of the complaint.

A. J. DAGGS,
Att'y for Def'ts.
R. E. DAGGS, *Per Se.*

101 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. JOHNS, and A. J. Daggs, Defendants.

Judgment. Filed March 15th, 1897, at 2.20 o'clock p. m.

This action having been regularly brought on for trial at this term of the court in its order upon the calendar, the plaintiff appearing by his attorney, Thos. Armstrong, Jr., and the defendants, R. E. Daggs in person, A. J. Daggs in person, W. A. Daggs and A. L. Johns by A. J. Daggs, their attorney, and the cause having been tried by the court without a jury, and the court having heard the testimony offered on the part of the plaintiff and the defendants, and, being fully advised, having on the 21st day of December, 1896, ordered judgment in favor of the plaintiff and against the defendants, as prayed—

It is now, on motion of Thos. Armstrong, Jr., attorney for the plaintiff, James Wilson, ordered, adjudged, and decreed:

1. That that certain sale of the real estate mentioned and described in the plaintiff's complaint herein (and hereinafter described) made by the sheriff of Maricopa county to the plaintiff, James Wilson, on the 6th day of June, 1894, under and by virtue of an execution and order of sale issued out of this court in cause No. 1954, wherein James Wilson was plaintiff and John S. Armstrong
102 and R. E. Daggs were defendants, be, and the same is hereby, with the certificate of sale and deed thereon issued by said sheriff to said James Wilson, set aside, vacated, and cancelled, and the satisfaction of the judgment in said last-mentioned cause made upon such sale is also hereby set aside and said judgment is hereby reinstated in as full force and effect as though such satisfaction had never been made, and the clerk of this court is ordered and required to cancel said satisfaction in the records of his office.

2. It is further ordered, adjudged, and decreed that the plaintiff, James Wilson, do have and recover of and from the defendant-R. E. Daggs and A. L. Johns, who have assumed and agreed to pay the plaintiff's mortgage debt sued in said action No. 1954 and in this action, the sum of sixty-five hundred ($6,500) dollars, with interest thereon from the 24th day of October, 1893, at the rate of eight per cent. per annum, making at the date of this judgment eight thousand one hundred forty-two dollars and thirty-three cents ($8,142.33), together with three hundred and fifty ($350) dollars as attorneys' fees and the costs of this action, taxed and allowed at the sum of $48.80, making altogether the sum of $8,541.13, and that $6,500.00 of said sum bear interest, at the rate of eight per cent. per annum, from the date of this judgment until —, and the balance bear interest, at the rate of seven per cent. per annum, from the date hereof until paid, and the plaintiff have and recover of said defendants said interest as well.

103 3. It is further ordered, adjudged, and decreed that said total sum of $8,541.13, with interest as aforesaid, is a lien upon the lands and property hereinafter described and is and has been such lien from and since the 24th day of April, 1893, the date of the mortgage described in the plaintiff's complaint herein, which mortgage and lien are hereby foreclosed, and said mortgage and lien are hereby adjudged and decreed to be wholly unpaid and unsatisfied.

4. It is further adjudged and decreed that the defendants, R. E. Daggs, A. L. Johns, A. J. Daggs, and W. A. Daggs, are now and have been since the 26th day of April, 1894, unlawfully, wrongfully, and fraudulently conspiring and confederating together to cheat, wrong, and defraud the plaintiff, James Wilson, out of all benefit and security in and by said mortgage to him given by John S. Armstrong on the lands and premises hereinafter described by fraudulent and pretended transfers of the fee and possession of said premises, and it is hereby ordered, adjudged, and decreed that that certain deed of conveyance of said premises executed by the defendant R. E. Daggs to the defendant A. L. Johns, dated on

its face on the 17th day of March, 1894, and recorded in the office of the county recorder of Maricopa county, Arizona, on the 28th day of April, 1894, in vol. — of Deeds, pages —, is fraudulent and void as against this plaintiff and as against the aforesaid mortgage of this plaintiff, and was made and executed by the said Daggs and recorded by him, the said Daggs, for the purpose of hinder-
104 ing and delaying the plaintiff in the securing of the title and possession to the aforesaid mortgaged premises and for the purpose of hindering and obstructing and delaying this plaintiff, James Wilson, in the prosecution of his said suit No. 1954 against said John S. Armstrong and R. E. Daggs and in hindering, delaying, and obstructing this plaintiff in the sale of said premises and in obtaining satisfaction of his said judgment by process of this court thereunder.

5. It is further ordered, adjudged, and decreed that the judgment of this court in said action No. 1954 entered on the 8th day of May, 1894, in favor of this plaintiff and against John S. Armstrong and R. E. Daggs do stand and the same be enforced and carried into effect by execution and order of sale upon this judgment of the property therein described (being the same property as involved herein and for the same indebtedness as is merged into this judgment), and that the notice of *lis pendens* filed in the office of the county recorder of Maricopa county in said action No. 1954 is and was full and complete notice to the defendant A. L. Johns of the pendency of said suit No. 1954, and the aforesaid deed of conveyance from R. E. Daggs to said A. L. Johns of the premises involved herein was given and recorded solely for the purpose of hindering, delaying, cheating, and defrauding the creditors of said R. E. Daggs, and especially this plaintiff, and for the purpose of casting a cloud on the title of any purchaser at sheriff's sale of said mortgaged premises.

6. It is further ordered, adjudged, and decreed that an order of sale issued by the clerk out of this court, directed to the
105 sheriff of Maricopa county, commanding him to seize and sell the said real estate, water rights, and rights of way described in the plaintiff's complaint herein as under execution in satisfaction of this judgment and of said judgment in said action No. 1954, with costs and accruing costs, and that in case the proceeds of such sale be insufficient to pay the said judgment with costs and accruing costs, then that said sheriff make the balance due upon this judgment out of any other property of said defendants, R. E. Daggs and A. L. Johns, and the balance due upon said judgment in case No. 1954 out of any property of said J. S. Armstrong, R. E. Daggs, and A. L. Johns as on ordinary execution.

7. It is further ordered, adjudged, and decreed that the said sheriff, at the expiration of six months from the date of such sale, make and execute to the purchaser or purchasers of said property at said sale or their assigns a proper and sufficient deed or deeds thereof, and that the defendants herein and all persons claiming or to claim any right, title, or interest in said premises under said defendants or any of them since the filing of the notice of pendency

of said action No. 1954, to wit, since April 26th, 1894, be forever barred and foreclosed of and from all equity of redemption and claim in and to said mortgaged premises and every part thereof from and after six months from the date of said sale. The description of the mortgaged premises and property to be sold under and by virtue of this decree is as follows, to wit:

All of the following-described real estate, situate, lying,
106 and being in the county of Maricopa, Territory of Arizona, to wit:

The northeast quarter of section number twenty-one, township one north of range four east of the Gila and Salt River base and meridian, except one strip of land off the east side of said quarter section thirty feet in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said railroad company for right of way purposes, except all of that portion of said quarter — which has been heretofore known as Farmers' addition to the town of Tempe, including herein, however, lots 1, 8, and 9, in block 1, and lot 5, in block 2, of said Farmers' addition, and excepting forty acres of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at the point of said quarter section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty rods, thence north eighty rods, thence east eighty rods, thence south eighty rods along the center of the street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Edward A. Murphy, and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred and forty-two and one-half (242½) feet west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen feet to a post, thence west two hundred and thirty-six feet to a post, thence north one hundred and fifteen feet to the center of said Eighth street, thence

along the center of said Eighth street two hundred and
107 thirty-six feet to the place of beginning; except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), thence west along the south boundary line of Eighth street six hundred twenty-nine and four-tenths feet to a point, being the northeast corner of the land hereby excepted; thence south one hundred forty-two feet, thence west one hundred thirty-seven and three-tenths feet, thence north one hundred forty-two feet, thence east one hundred thirty-seven and three-tenths feet to the northeast corner of the land hereby excepted.

Also *pro rata* of share number sixty-six in the Tempe irrigation canal.

8. It is further ordered, adjudged, and decreed that the plaintiff, James Wilson, have leave at any time hereafter to apply to this court for a receiver of said mortgaged premises above described upon the pleadings and judgment herein and upon such further

papers and proceedings as he may be advised are requisite thereto.
Done in open court this 21st day of December, 1896.
By the court:

A. C. BAKER, *Judge.*

108 In the District Court, Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
against
R. E. DAGGS, A. L. JOHNS, W. A. Daggs, & A. J. Daggs, Defendant-.

Clerk's Certificate to Judgment-roll. Filed March 15, 1897. J. E. Walker, Clerk.

I, the undersigned, clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book F of said court, at page 192; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and seal of the district court this 15th day of March, A. D. 1897.

J. E. WALKER, *Clerk.*

109 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS ET AL., Defendant-.

Memorandum of Costs and Disbursements. Filed March 15th, 1897.

Disbursements.

Sheriff's fees	$17.70
Clerk's fees	31.10
	$48.80

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Thos. Armstrong, Jr., being duly sworn, deposes and says that he is the attorney for the pl'ff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said pl'ff; that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

THOS. ARMSTRONG, JR.

Subscribed and sworn to before me this 15 day of March, 1897.
J. E. WALKER, *Clerk,*
By C. H. KNAPP, *Deputy.*

110 *Summons.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. JOHNS, and A. J. DAGGS, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court. Filed June 24, 1895.

In the name of the Territory of Arizona to R. E. Daggs, W. A. Daggs, A. L. Johns, and A. J. Daggs, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 22nd day of June, A. D. 1895.

[District Court Seal.]

J. E. WALKER,
Clerk of said District Court,
By LEWIS JORDAN,
Deputy Clerk

111 OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 22nd day of June, A. D. 1895, at the hour 3.30 p. m., and personally served the same on the 22nd day of June, A. D. 1895, on W. A. Daggs, being one of the said defendants named in said summons, by delivering to him, W. A. Daggs, at the county of Maricopa, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons and a true copy of the order to show cause made in this case on the 22nd day of June, 1895.

Dated this 24th day of June, A. D. 1895.

L. H. ORME, *Sheriff,*
By J. T. GIBSON,
Deputy Sheriff.

SHERIFF OF MARICOPA COUNTY,
PHŒNIX, ARIZONA, *June*, 1895.

I hereby certify that I received the within summons on the 22nd day of June, 1895, at 3.30 p. m., and personally served the same on the 22nd day of June, 1895, on R. E. Daggs and A. J. Daggs, they being two of the said defendants named in summons, by delivering to each one of said defendants, at the county of Maricopa, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons and a true copy of the order to show cause made in this case the 22nd day of June, 1895.

On the same day I made service of the same papers on A. L. Johns, defendant herein, by delivering to A. J. Daggs, at-
112 torney-in-fact of the said A. L. Johns, the copy of summons, complaint, and order to show cause made in this case.

L. H. ORME,
Sheriff Maricopa County, Arizona Territory.

In the District Court of the Third Judicial District of the Territory of Arizona within and for Maricopa County.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS ET AL., Defendants. } Defendants' Answer. Filed June 27, 1895.

Comes all the defendants, by their attorney, A. J. Daggs, and objects to the sufficiency of the application of plaintiff for the appointment of a receiver herein:

1. Because the court has no jurisdiction.
2. Because the allegations in plaintiff's complaint do not warrant the appointment of a receiver.
3. Because there is no equity in the bill.
4. Because the plaintiff has an adequate remedy at law.

A. J. DAGGS,
Attorney for Defendants.

Should the defendants' demurrer be by the court overruled, defendants deny each and every allegation in plaintiff's application for a receiver contained not hereinafter admitted or otherwise plead.

1. Defendants admit that plaintiff is a non-resident.

2. Further answering, deny that plaintiff's mortgage is a
113 superior lien on the property in plaintiff's petition or any part thereof, but admits that said mortgage has been foreclosed against the mortgagor, John S. Armstrong, and against the defendant R. E. Daggs.

3. Defendants further admit that plaintiff failed in his former action to make A. L. Johns and W. A. Daggs parties to said action, although plaintiff was often requested so to do.

4. Defendant specifically denies that plaintiff's former foreclosure was ineffectual or that plaintiff was unable to obtain satisfaction thereby of his mortgage.

5. Defendants further admit that said premises were sold under order of sale issued on said judgment, and that plaintiff became the purchaser thereof.

6. And further admit that the time for redemption has long since expired as to the defendants John S. Armstrong and R. E. Daggs, the only parties defendant to plaintiff's first foreclosure proceeding.

7. Defendants specifically deny that the said R. E. Daggs has assumed the said mortgage described in plaintiff's petition or expressly agreed to pay the same or any part thereof.

8. Defendants further deny that plaintiff has made repeated demands on defendants for said pretended claim or for the surrender of said premises.

9. Defendants further deny that they have made secret transfers of said property, as stated in plaintiff's complaint, or that they have withheld said deeds of conveyance from the record, or that
114 they have by verbal leases, as set forth in plaintiff's complaint, rendered plaintiff's former foreclosure ineffectual, but avers the fact to be that each act, lease, deed, and transfer have been executed openly and avowedly and in good faith and within the full knowledge of plaintiff and his agents.

10. Defendants deny specifically that plaintiff was compelled to bring this his said action to make his former foreclosure effectual, but avers the fact to be that plaintiff could have and can now obtain satisfaction on said judgment by issuing execution thereon against the defendants therein named.

11. Defendants deny specifically that A. L. Johns, R. E. Daggs, or A. J. Daggs are insolvent, but admits that A. L. Johns is a nonresident.

12. Defendants deny specifically that the property described in plaintiff's complaint is the only means or property out of which plaintiff could make his alleged claim, but avers the fact to be that the mortgagor, John S. Armstrong, and defendants R. E. Daggs and A. L. Johns are all and each of them perfectly solvent, and have abundance of property above their debts.

13. Defendants aver that they have no knowledge of the amount of plaintiff's alleged claim, but aver upon information and belief that plaintiff has received deeds to lots 1, 8, and 9, block 1, and lots 5, block 2, of Farmers' addition to the town of Tempe, which lots are more fully described in plaintiff's mortgage, and other sums of money, *to* amounts of which these defendants have not been informed, as payments on plaintiff's pretended claim.

115 14. Defendants deny specifically that said premises are inadequate security for plaintiff's pretended claim, or that they have committed any waste on said premises.

15. Defendants deny specifically that R. E. Daggs claims any interest in said property.

16. Defendants admit that the premises in question were worth $10,000 at the date of plaintiff's pretended mortgage, and aver the fact that the said premises are now worth more than $10,000.

17. Defendants deny that the said land was well set to alfalfa or

was clear of weeds, or that said fences and dwelling *was* in good repair.

18. Defendants deny that during the ownership or possession of defendants or either of them that they have refused and neglected to irrigate or cultivate the said land or willfully neglected the same, or any part thereof, or that the said alfalfa is largely burned out, or that they have neglected or refused to keep in repair the dwelling-houses or fences on said premises, but aver the fact to be that they have cared for the said premises in a good, husbandlike manner.

19. Defendants deny that the building and fences constitute a large part of the value of said land, but aver the fact to be that the building and fences are not worth to exceed one thousand ($1,000) dollars.

20. Defendants deny specifically that they have failed or refused to pay the taxes for the two years last past, but aver the fact
116 to be that they have paid all the taxes due up to January 1st, 1894, and have been ready and willing to pay all taxes found due since that date, all taxes being fully paid up to this date.

21. Defendants deny that A. L. Johns — R. E. Daggs assumed or agreed to pay said taxes, or that R. E. Daggs or A. L. Johns were bound to pay said taxes for the benefit of said plaintiff, or that defendants have committed great waste of any waste, or that said premises have depreciated in value or *is* insufficient to satisfy plaintiff's pretended claim, or that plaintiff has any claim that is a lien on said premises at this date.

22. Defendants deny specifically that plaintiff has reason to believe or does believe that defendants have neglected said premises or committed any waste thereon, or that any act done by defendants was willful or malicious or done to cheat or defraud plaintiff or reduce the value of his alleged claim, or that they will continue to do any act detrimental to plaintiff, or that it is necessary for the protection of plaintiff's pretended rights that a receiver be appointed, or that plaintiff is entitled to the rents and profits of said premises, or any part thereof.

23. Defendants, further answering, aver that at the time the plaintiff brought his first foreclosure proceedings and prior thereto plaintiff knew of the transfer of the property in question from R. E. Daggs to A. L. Johns, and that at the time of bringing his first foreclosure and at divers times thereafter plaintiff and his agents were informed by R. E. Daggs that he had no interest in said property, and that the said property had been transferred to
117 A. L. Johns.

24. Defendants, further answering, say that they are informed and believe, and so state the facts to be, that John S. Armstrong has paid off and discharged the plaintiff's mortgage and pretended claim, and that this action is being carried on in the interest of the said John S. Armstrong.

25. Defendants further say that the plaintiff and his agents have heretofore attempted to deprive the said A. L. Johns of his rights by writs of possession and have in divers ways attempted to take

possession of said premises, and are now, by asking a receiver, attempting, circuitously, to oust said Johns from his possession.

Defendants, having fully answered, would respectfully submit that the application for a receiver herein should be denied with costs.

A. J. DAGGS,
Attorney for Defendants.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

A. J. Daggs, being duly sworn, on oath says that he is the attorney of A. L. Johns and makes this affidavit on behalf of A. L. Johns and on his own behalf; that he has read the foregoing answer and knows the facts therein stated are true of his own knowledge except such as are stated on information and belief, and he believes them to be true.

A. J. DAGGS.

Subscribed and sworn to before me this 26 day of June, A. D. 1895.

THEO. T. POWERS,
[NOTARY SEAL.] *Notary Public.*

118 In the District Court of the Third Judicial District of the Territory of Arizona within and for Maricopa County.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS ET AL., Defendants. } Affidavit of R. E. Daggs.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs, one of the defendants herein, being duly sworn, says that he has read the foregoing answer and knows the facts therein to be true of his own knowledge except such as are stated on information and belief, which he believes to be true.

R. E. DAGGS.

Subscribed and sworn to before me this 26 day of June, A. D. 1895.

THEO. T. POWERS,
[NOTARY SEAL.] *Notary Public.*

119 In the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, W. A. DAGGS, A. L. JOHNS, and A. P. Daggs, Defendants. } Affidavit of W. A. Daggs. Filed June 27, 1895.

Comes W. A. Daggs, one of the defendants in the above-entitled cause, who, being duly sworn, upon his oath states that he is now

residing on the premises described in plaintiff's complaint at Tempe, A. T.

2nd. That he has resided there more than the last past three years under various landlords.

3rd. That he first entered the premises under a written lease from James Wilson, dated Jan. 8, 1892, and to continue for the term of one year, to end Jan. 15, 1893, to be extended for the further term of one year at his option, which option said Daggs exercised and continued his lease under said James Wilson for the further term of one year, ending Jan. 15, 1894; that during his second year's lease under James Wilson said Daggs, by order of James Wilson, paid a part of the rents to John S. Armstrong, the mortgagor in the foregoing mortgage named.

4th. That at that date, Jan. 14, 1894, he became the tenant of R. E. Daggs and continued in possession of said premises under R. E. Daggs as his landlord up to April 1st, 1894, at which
120 time he became the tenant of A. L. Johns, of Chicago, Ill., for the term of one year from date of April 1st, 1894, with the option to continue the said lease for a further term of one year; that he has exercised his option and continued his lease for another year and to April 1st, 1896, when his said lease under A. L. Johns, of Chicago, will expire.

5th. That during all the times heretofore mentioned he has cared for and attended to said farm of 111 acres of land and said orchard, ornamental trees, and shrubbery the same as — it had been his own and in a good and farmerlike manner, and gave it the usual irrigation; that the said lands had been attended to prior to his tenancy by the said Wilson and they had become out of repair.

7th. That he has used the said lands during his aforesaid tenancy for pasture for horses, cattle, sheep, and goats.

8th. That during his tenancy under R. E. Daggs he rebordered the lands and cleaned out the ditches and reseeded the entire premises at a large expense and cost, and that during his tenancy he has changed the headgates around there from mud to lumber at his own expense, and since his tenancy as aforesaid that he has inclosed and put in cultivation 30 acres of the lands in question at this own cost and expense.

9th. That the farm generally is in as good repair as any farm in the valley used exclusively for stock, and in better repair than it was when he first went on to it, three years ago; that he has cleaned out the well and put in a new force-pump, and that he has kept the buildings up and in better repair than they were when he entered under the plaintiff.

121 10th. Affiant further says that as the tenant of A. L. Johns he is paying, an annual rent for the use and occupation of said premises, the sum of $500.00 per annum, the same rent he paid the plaintiff when he was the tenant of plaintiff.

11th. Affiant further says that he is acquainted with the value of land around and about the city of Tempe and in the Salt River valley and this land, and that it is worth more per acre now than

when he first rented the farm, and that $100.00 per acre would be a very low estimate for the value of this land at the present time.

12th. Affiant further states that he has already paid the rent for this year, and that it would be a great hardship on him, as it is now fruit time, to move his effects and abandon the premises, and a great portion of the fruits would be lost.

13th. Affiant further states that he is acquainted with A. L. Johns, of Chicago; that he is a man of high standing, of reputed wealth, and responsible for any contract that he will make.

14th. Affiant further shows that he is personally acquainted with John S. Armstrong, the mortgagor in the foregoing mortgage named, and knows of his own personal knowledge of real estate belonging to said Armstrong worth over $40,000.00 laying right here in Maricopa county, A. T., and has so owned said property long prior to the bringing of this suit.

15th. Affiant further shows that R. E. Daggs is a large property-owner in Salt River valley and is perfectly solvent, and that R. E. Daggs paid the taxes on said land for the year 1893.

122 16th. Affiant further says that he knows the matter and facts set forth in the foregoing statement and showing are true of his own knowledge.

W. A. DAGGS.

Subscribed and sworn to before me this 25th day of June, 1895.

W. J. KINGSBURY,
Notary Public.

[NOTARY SEAL.]

In the District Court of the Third Judicial District of the Territory of Arizona within and for Maricopa County.

JAMES WILSON, Plaintiff,
vs.
R. E., P. P., W. A., and A. J. DAGGS and A. L. Johns, Defendants.

Affidavit of R. E. Daggs.
Filed June 27, 1895.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

R. E. Daggs, being first duly sworn, on oath states that he is the R. E Daggs, one of the above-named defendants.

Your affiant states that he purchased the premises described in plaintiff's complaint in December, 1893, and took possession of same in January, 1894, and continued to own and control said premises until March 17th, 1894, when affiant sold said property to his co-defendant A. L. Johns, of Chicago, Illinois, for the price of $11,500, and on April 1st, 1894, delivered possession of same to said Johns; that since April 1st, 1894, affiant has has no interest in said premises in any way, and has not had possession or control

123 in any way; which fact affiant has repeatedly stated to plaintiff's agents, and has also made affidavit to this effect in this court on plaintiff's former application for possession.

Affiant further states that an action was brought by plaintiff in this court, numbered 1954 and styled James Wilson *vs.* John S. Armstrong and R. E. Daggs; that said case was prosecuted to judgment. Affiant further states that that is the same case referred to in plaintiff's petition herein. Affiant further states that this co-defendant John S. Armstrong in that case, who is the mortgagor in plaintiff's mortgage named, is a man of reputed wealth, has the reputation of being perfectly solvent, and is now running a bank in South Carolina, and has the following property situated in this county, as shown by the tax books: The W. ½, section 9, one S., 5 E.; the E. ½ S. E. ¼, sec. 22, 1 N., 4 E.; also lots 6, 7, 8, 9, 10, 17, 18, 19, 20, 21, and 22, in block 51; lots 2 and 3, in block 5, and all of block 54, in the town of Tempe. Said property affiant says he is informed and believes is worth from 25 to 40 thousand dollars. Also has an action in attachment pending in this court to recover some $7,000. Affiant further states that lots 1, 8, and 9, block 1, and lots 5, block 2, in Tempe, which lots are included in plaintiff's said mortgage, which lots *was* omitted from plaintiff's former foreclosure, have been deeded to plaintiff since plaintiff's former foreclosure by the mortgagor in plaintiff's mortgage named.

Affiant further states that he is not insolvent, as sworn to by plaintiff's agent (which fact plaintiff's agent well knew when
124 he made said affidavit), but owns more than 490 acres of land in Maricopa county, Arizona, and other property, and is perfectly responsible for any judgment that plaintiff might recover in this case.

Affiant further states that he is acquainted with the financial reputation of his codefendant A. L. Johns (whom plaintiff's agent swears is insolvent), and that said Johns is reputed to be perfectly responsible for all his contracts. Affiant further states that he has no knowledge of the frauds, conspiracies, and collusions charged in plaintiff's complaint in this case, and that he has only acted openly and fairly and as a business man in the matter.

Affiant further states that he is acquainted with the land in question and its condition, and affiant states that said property is in as good condition now as when he purchased same in December, 1893.

Affiant states that he is informed and believes that the tenants in charge have cared for said land in a good and husbandlike manner and done all necessary repairing on said premises and said buildings.

Affiant further states that it is not true that he has not paid the taxes on said property for the last two years past, but affiant states that he paid all taxes on said property up to January 1st, 1894.

Affiant further states that he is acquainted with the property and premises in question and land in general in Salt River
125 valley, and would consider said land reasonably worth $12,000.

Affiant further states that he will give more than the amount of plaintiff's pretended claim for said premises at this date.

R. E. DAGGS.

Subscribed and sworn to before me this 26 day of June, A. D. 1895.

[NOTARY SEAL.] THEO. T. POWERS.

In the District Court of the Third Judicial District of the Territory of Arizona within and for Maricopa County.

JAS. WILSON, Plaintiff,
vs.
R. E. DAGGS ET AL., Defendants.

Affidavit of A. J. Daggs.
Filed June 27, 1895.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

1st. A. J. Daggs, being duly sworn, upon his oath deposes and says that he is one of the defendants in the above action.

2nd. That he is acquainted by reputation with John S. Armstrong, the mortgagor in the mortgage named in plaintiff's complaint; that he has examined the records concerning the said Armstrong's property and finds that John S. Armstrong has large blocks of real estate in his name in Maricopa county, Arizona, and pays over two hundred dollars tax in this county, and now
126 has suits to recover on notes and mortgages filed in this court of over $7,000.

3rd. That he is acquainted with the financial ability of R. E. Daggs, and knows him to be responsible for his contracts *for his contracts*, and owns large tracts of real estate in Maricopa county, Arizona, which is worth more than $10,000 over and above his debts.

4th. That he knows the property of 111 acres of land in question, and, while it is used as a pasture and is now fed off by stock, it is well seeded and in better shape than three-fourths of the farms in the valley, and that the ornamental trees and shrubbery and orchard are in fine shape, and the buildings and fences are up and present no other appearance than the necessary wear of such property.

5th. That he has made inquiry concerning other property in and around about the city of Tempe, Arizona, and about the property in question, and he is informed and believes, and so states the facts, that this property was worth at least $100 per acre, and has recently appreciated in value and is now worth from $125 to $150 per acre.

6th. Affiant further says that he has read the affidavit signed by Thos. Armstrong, Jr., in the application for receiver herein, and is very much surprised at the statements therein concerning a reputed conversation had between the said Armstrong and this affiant. Affiant shows that he has not lived in Salt River valley, Arizona, more than seven months, and has no means of knowing the
127 value of property when plaintiff's mortgage was given more than three years ago, and does not now know the value of said property except upon information; that he did not make the statement alleged and sworn to by Thos. Armstrong, Jr., of the

value of land three years ago or at the present time, and never told Thos. Armstrong, Jr., that the land in question had depreciated in value, but affiant is informed, on the contrary, with two new railroads tapping Tempe, it is widespread and notorious that the property around Tempe has increased in value recently, and the said Thos. Armstrong, Jr., well knows that fact.

7th. Affiant further says that he has no interest in this matter, only as an attorney doing his sworn duty to his clients.

8th. Affiant further shows that he called at the tax collector's office for Maricopa county, Arizona, when taxes were due for the year 1894, and asked to pay the taxes on the property in question for A. L. Johns, and was then informed by that officer that the taxes had been paid.

9th. Affiant further says that he has no knowledge or information concerning the various frauds and conspiracies charged in plaintiff's complaint, but in so far as he knows all acts concerning this property have been done openly and in the regular course of human affairs and business and in perfect good faith.

A. J. DAGGS.

Subscribed and sworn to before me this 26 day of June, A. D. 1895.

THEO. T. POWERS,
Notary Public.

[NOTARY SEAL.]

128 In the District Court of the Third Judicial District of the Territory of Arizona within and for Maricopa County.

JAS. WILSON, Plaintiff,
vs.
A. L. JOHNS ET AL., Defendants.

Affidavit of A. J. Daggs, as Agent of A. L. Johns. Filed June 27, 1895.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss:*

A. J. Daggs, as the agent of A. L. Johns and in his behalf, being duly sworn, says:

1st. That he is the agent of A. L. Johns, of Chicago, Illinois, and has charge of all his business in this Territory; that A. L. Johns purchased the land in question in perfect good faith and recorded his deeds with all convenient speed and in due course of his business.

2nd. That A. L. Johns has a large business and a great deal of it is intrusted to his agents and attorneys.

3rd. That he knows A. L. Johns personally and is partially acquainted with his financial ability, and knows him to be a man of vast amount of property, perfectly responsible for his contracts and solvent.

A. J. DAGGS.

Subscribed and sworn to before me this 26 day of June, A. D. 1895.

[NOTARY SEAL.] THEO. T. POWERS,
Notary Public.

129 PHŒNIX, ARIZONA, *April 12th*, 1897.

To the sheriff of Maricopa Co. to Arizona Gazette, Dr., publishers Arizona Daily and Weekly Gazette, largest circulation in Arizona.

March 19. To pub. adv., as per annexed copy, 14 in., Wilson *vs.* Armstrong..... 35.00

THE ARIZONA GAZETTE,
By A. S. MILLS.

Sheriff's Sale.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiffs,
vs.
JOHN S. ARMSTRONG and R. E. DAGGS, Defendant-. } Suit No. 1945.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. DAGGS, and A. J. Daggs, Defendants. } Suit No. 2327.

Under and by virtue of an execution and order of sale issued out of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa on the 15th day of March, 1897, and to me as sheriff duly directed and delivered, on judgments in favor of said plaintiff and against said defendants above named, which said judgments are for the foreclosure of the plaintiff's mortgage lien on the property hereinafter described, as such lien was adjudged to be established and to have existed
130 from and since the 24th day of April, 1893, and for the recovery of the sum of $6,500, with interest, at eight per cent. per annum, from May 8, 1894, and the sum of $655.08, with interest thereon, at the rate of seven per cent. per annum, from May 8, 1894, against and from said John S. Armstrong, and for the recovery of the sum of $8,541.13, with interest on $6,500 thereof, at eight per cent. per annum, from December 21, 1896, and with interest on the sum of $2,041.13 thereof from December 21, 1896, at the rate of seven per cent. per annum, against and from said R. E. Daggs and A. L. Johns, I have this day levied on all the right, title, claim, and interest which said defendants, John S. Armstrong, R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns, had in the premises hereinafter described on the 24th day of April, 1894, or which they of any person claiming under them or either of them has since acquired in and to said premises.

Public notice is hereby given that I will, at the court-house door of the said county of Maricopa, at the hour of 10 o'clock a. m. on Saturday, the 10th day of April, 1897, sell at public auction to the highest and best bidder, for cash, in lawful money of the United States, all the right, title, claim, and interest *of* the above-named defendants, John S. Armstrong, R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns, or either of them or any person holding under them or either of them, has now or has had or acquired from and since the 24th day of April, 1894, in and to said premises and property, or so much as may be necessary to satisfy said judgments, costs, and costs of sale, as I am commanded in and by said order of sale.

131 The description of the premises and property so levied on and so to be sold as aforesaid is as follows, viz:

All of the following-described real estate, situate, lying, and being in the county of Maricopa, Territory of Arizona, to wit:

The northeast quarter of section number twenty-one, township one north of range four east of the Gila and Salt River base and meridian, except one strip of land off the east side of said quarter section thirty feet in width from the center of the Maricopa and Phœnix Railroad track heretofore deeded to said railroad company for right-of-way purposes; except all of that portion of said quarter which has been heretofore known as Farmers' addition to the town of Tempe, including herein, however, lots 1, 8, and 9, in block 1, and lot 5, in block 2, of said Farmers' addition, and excepting forty acres of land in the southeast part of said quarter section being particularly described as follows, to wit: Commencing at the point of said quarter section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty rods, thence north eighty rods, thence east eighty rods, thence south eighty rods along the center of the street above mentioned to the place of beginning, and except the lot or parcel of ground in said quarter section belonging to Edward A. Murphy and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred and forty-two and one-half ($242\frac{1}{2}$) feet west from the center of the Maricopa & Phœnix Railroad track, running thence south one hundred and fifteen feet to a

132 post, thence west two hundred and thirty-six feet to a post, thence north one hundred and fifteen feet to the center of said Eighth street, thence along the center of said Eighth street two hundred and thirty-six feet to the place of beginning; except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and resided upon by Edward A. Murphy in said quarter section (as above described), thence west along the south boundary line of Eighth street 629.4 feet to a point being the northeast corner of the land hereby excepted, thence south 142 feet, thence west 137.3 feet, thence north 142 feet, thence east 137.3 feet to the northeast corner of the land hereby excepted.

Also *pro rata* of share No. 66 in the Tempe irrigation canal.

L. H. ORME, *Sheriff.*

Dated March 19, 1897.
First publication March 19.

133 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG & R. E. DAGGS, Defendants. } #1954.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. DAGGS, and A. J. Daggs, Defendants. } #2327.

OFFICE OF THE SHERIFF, }
County of Maricopa. }

Received of L. H. Orme, sheriff, the sum of two thousand (2,000) dollars in part payment of the judgment and costs in the above-entitled cases, said sum being the amount bid and received for the property this day sold at sheriff's sale under foreclosure and order of sale, and said sum being represented by the certificate of sale issued to the purchaser of said property, who is also the plaintiff in these cases.

April 10th, 1897.

THOS. ARMSTRONG, JR.,
Att'y for James Wilson, Plaintiff.

1st judgment	$6,500.00
Int. 8% 3⅔ mos	158.88
2nd judgment	2,041.13
Int. 7% 3⅔ mos	43.65
Accrued costs	117.60
	$8,861.26
By sale	2,000.00
Bal. due	$6,861.26

134 OFFICE OF THE SHERIFF, }
County of Maricopa. }

Under and by virtue of this execution and order of sale I duly levied and seized upon in the manner and form required by law all the interest as set forth and described in said order of each and all of the defendants named herein in and to all the property described in said order.

I duly advertised and noticed said property for sale, as required by law and the mandate of said writ, by causing to be published in the Arizona Gazette, a newspaper published in said county, the

legal notice of sheriff's sale, and by posting in said county three printed copies of said notice, one of which was posted at the court-house door of said county, and all of said notices being made and continued for twenty-one days next before said sale.

On the 10th day of April, 1897, at the front door of the court-house of said county, in the city of Phœnix, at 10 o'clock a. m., all of said property mentioned, set forth, and fully described in said writ was duly offered for sale at public auction pursuant to said notice and said order. The said sale so noticed was then postponed and legal notice given until two o'clock p. m. of the same day by order of the plaintiff's attorney, and at said hour the said property was again offered for sale as required by said order, and at said sale the said property described in said order was then and there struck off and sold to A. J. Daggs for the sum
of $5,500.00, he being the highest bidder, and that being the
135 highest bid. At 3 o'clock p. m. on said day I offered to said purchaser the certificate of sale and demanded payment of the $5,500.00 as bid. Said purchaser refused to pay the amount so bid or to take said property, and verbal notice was then given to him, the said purchaser, he being one of the defendants named in said order, that said property would be again offered for sale under said writ at 3.30 o'clock p. m. of the said 10th day of April, 1897. At 3.30 o'clock p. m. on said day, at the same place, said property was again offered for sale under said writ and pursuant to notice given, and at said sale all of the said property mentioned, set forth, and fully described in said order was duly struck and sold to James Wilson, the said plaintiff, for two thousand (2,000) dollars, he being the highest bidder, and that being the highest sum bid, and said sum so bid being a part of the judgment and costs herein, this writ is now returned partly satisfied, the sum of $6,861.26 being now due and unpaid on said judgment. I have made and delivered to said purchaser the legal certificate of sale, and have filed a duplicate of said certificate with the county recorder of said county. The receipt of plaintiff's att'ey for the amount received is attached hereto and made a part of this return.

April 12th, 1897.

L. H. ORME, *Sheriff*,
By H. C. ORME, *Deputy*.

136 *Order of Sale.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

Filed April 12th, 1897.

JAMES WILSON, Plaintiff,
vs.
JOHN S. ARMSTRONG and R. E. DAGGS, Defendants. } Suit No. 1954.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. DAGGS, and A. J. Daggs, Defendants. } Suit No. 2327.

The Territory of Arizona to the sheriff of Maricopa county, Greeting:

Whereas on the 8th day of May, 1894, James Wilson recovered a judgment in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa against John S. Armstrong in the action numbered 1954 for the sum of seventy-one hundred fifty-five dollars and eight cents ($7,155.08), with interest from said 8th day of May, 1894, on $6,500.00 of said sum until paid at the rate of eight per cent. per annum, and with interest on the balance of said sum, to wit, on $655.08, at the rate of seven per cent. per annum, with a foreclosure of the mort-
137 gage lien of said James Wilson on the real estate hereinafter described; and

Whereas an execution and order of sale were afterward issued upon said judgment and the same satisfied by the sheriff's return of sale thereon; and

Whereas afterward, to wit, on the 21st day of December, 1896, said James Wilson did in said district court obtain judgment in said action No. 2327 setting aside said satisfaction of said judgment above mentioned and the certificate of sale and deed issued thereon and reinstating said judgment, and did also in said action No. 2327 obtain judgment against said R. E. Daggs and A. L. Johns for the sum of $8,541.13, with interest upon $6,500.00 of said sum, at eight per cent. per annum, from December 21st, 1896, and with interest upon the balance of said sum from December 21st, 1896, at the rate of seven per cent. per annum, until paid, with judgment as against all said defendants for the foreclosure of his mortgage lien securing said judgment on the premises and property hereinafter described as said lien was adjudged to be established and to have existed since the 24th day of April, 1893, and that said property be sold as on execution to satisfy said judgment; and

Whereas said judgments were duly entered and docketed in this court and are wholly unpaid and unsatisfied:

Therefore you are hereby commanded that you seize and sell the

said property hereinafter described (being that described in said judgment and therein ordered sold) as on execution and apply the proceeds in satisfaction of said judgment, the whole of said
138 proceeds to be applied upon and toward the satisfaction of each of said judgments, and should the proceeds of sale be insufficient to satisfy said judgments, with interest and costs and costs of sale, then that you make the balance out of any other property of said John S. Armstrong, R. E. Daggs, or A. L. Johns, as in case of ordinary execution.

The following is a description of the property and premises so ordered to be seized and sold, and which you are commanded as aforesaid to seize and sell, viz:

All of the following-described real estate, situate, lying, and being in the county of Maricopa, Territory of Arizona, to wit:

The northeast quarter of section number twenty-one, township one north, of range four east, of the Gila and Salt River base and meridian, except one strip of land off the east side of said quarter section thirty feet in width from the center of the Maricopa and Phœnix Railroad track, heretofore deeded to said railroad company for right of way purposes, except all of that portion of said quarter which has been heretofore known as Farmers' addition to the town of Tempe, including herein, however, lots 1, 8, and 9, in block 1, and lot 5, in block 2, of said Farmer's addition, and excepting forty acres of land in the southeast part of said quarter section, being particularly described as follows, to wit: Commencing at the point of said quarter section in the center of the first street west of the Maricopa and Phœnix Railroad track, running thence west eighty rods; thence north eighty rods; thence east eighty rods; thence south eighty rods along the center of the street above mentioned to the place of beginning; and except the lot or parcel of ground in said quarter section belonging to Edward A. Marphy and particularly described as follows, to wit: Commencing at a point in the center of Eighth street two hundred and forty-two and one-half ($242\frac{1}{2}$) feet west from the center of the Maricopa and Phœnix Railroad track, running thence south one hundred and fifteen feet to a post; thence west two hundred and thirty-six feet to a post; thence north one hundred and fifteen feet to the center of said Eighth street; thence along the center of said Eighth street two hundred and thirty-six feet to the place of beginning, except the lot or parcel of ground in said quarter section belonging to Walter S. Johnstone and particularly described as follows, to wit: Commencing at a stake at the northeast corner of the lot now owned and re-
139 sided upon by Edward A. Murphy in said quarter section (as above described), thence west along the south boundary line of Eighth street six hundred twenty-nine and four-tenths feet to a point being the northeast corner of the land hereby excepted; thence south one hundred forty-two feet; thence west one hundred thirty-seven and three-tenths feet; thence north one hundred forty-two feet; thence east one hundred thirty-seven and three-tenths feet to the northeast corner of the land hereby excepted.

Also *pro rata* of share number sixty-six in the Tempe irrigation canal.

Hereof fail not, and have you the said moneys, together with this writ, showing how you have executed the same, before the court aforesaid, at the court-house, in the city of Phœnix, within sixty days after the receipt hereof.

Witness the Honorable A. C. Baker, judge of said court, at the court-house, in the city of Phœnix, county of Maricopa and Territory of Arizona, this 15th day of March, 1897.

Attest my hand and the seal of said court the day and year last above written.

[District Court Seal.]

J. E. WALKER, *Clerk*,
By C. H. KNAPP,
Deputy Clerk.

Items of Cost Bill.

Sheriff's fees	$17.70
Clerk's "	31.10
	$48.80
Clerk's accrued —	2.00

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

By virtue of the above and foregoing order of sale, I have this day seized and levied upon all the right, title, claim, and interest of the defendants herein named or either of them in, of, and to the property herein described and as said — has existed since the 24th day of April, 1893.

Dated March 18th, 1897.

L. H. ORME,
Sheriff of Maricopa County,
By J. E. DOYD, *Deputy*.

140 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs, Def'ts.

Motion of Def'ts for New Trial. Filed December 23rd, 1896.

Comes the defendants and moves the court for a new trial and to set aside and arrest the judgment on this cause for the following reasons:

I.

Because the court erred in overruling the demurrer of the defendants and each of them.

II.

Because the court erred in overruling the defendants' motion for a continuance.

III.

Because the court erred in overruling defendants' motion for a change of venue.

IV.

Because the court erred in overruling defendants' motion for judgment upon the evidence.

V.

Because the court erred in overruling defendants' objection to the introduction of any testimony on the grounds the petition did not state facts sufficient to constitute a cause of action.

141 VI.

Because the court erred in admitting illegal, incompetent, and immaterial evidence in favor of plaintiff over the objections of defendant-.

VII.

Because the judgment is against the evidence.

VIII.

Because the judgment is against the law of the case.

IX.

Because the judgment is not responsive to the issues.

X.

Because the judgment is void.

XI.

Because the court was without jurisdiction to render the judgment.

A. J. DAGGS, *Att'y for Def'ts.*
A. L. JOHNS,
W. A. DAGGS, And *Pro Se.*
R. E. DAGGS, *Pro Se.*

142 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS, R. E. DAGGS, W. A. DAGGS, A. J. Daggs, Defendants.

Supersedeas Bond.
Filed April 9th, 1897.

Whereas in the above numbered and entitled cause pending in the district court of Maricopa county and at a regular term of said court, to wit, on the 21 day of Dec., A. D. 1896, the said James Wilson recovered judgment against the said defendants, A. L. Johns,

R. E. Daggs, W. A. Daggs, and A. J. Daggs, for the sum of $8,441.13 *dollars* and for foreclosure of mortgage, with interest thereon from the 21 day of December, 1896, at 8 per cent. per annum, and all costs of suit; from which judgment the said A. L. Johns, R. E. Daggs, W. A. Daggs, & A. J. Daggs has taken an appeal to our supreme court and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, A. L. Johns, R. E. Daggs, W. A. Daggs, and A. J. Daggs, as principal-, and the London Co. and —— ——, as sureties, acknowledge ourselves bound to pay James Wilson the sum of $17,182.26, being double the judgment & costs as fixed by the court, conditioned that the said A. L. Johns, R. E. Daggs, W. A. Daggs, & A. J. Daggs shall prosecute their appeal with effect, and in case the judgment of the appellate court shall be against
143 them that they shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against them.

Witness our hands this 8th day of April, 1897.

A. L. JOHNS,
W. A. DAGGS,
R. E. DAGGS,
By A. J. DAGGS, *Their Att'y.*
A. J. DAGGS, *Pro Se.*
THE LONDON COMPANY,
By A. J. DAGGS, *Its President.*

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

A. J. Daggs, being duly sworn, deposes and says that he is the president of The London Company and makes this affidavit for it on its account and in its stead, and that it is a corporation organized and existing under the laws of this Territory, and has by its charter power and authority to sign bonds and other instruments of indemnity; that he is acquainted with its assetts and liabilities, and knows of his own knowledge that it is worth the amount for which it has become liable as surety on the above and foregoing bond over and above its just debts and liabilities, exclusive of property exempt from execution.

THE LONDON COMPANY,
By A. J. DAGGS, *Its President*

Subscribed and sworn to before me this 9th day of April, 1897.

[NOTARIAL SEAL.]

B. A. FICKAS,
Notary Public.

144 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. DAGGS, and A. J. Daggs, Defendants.

Exceptions to Bond. Filed April 10th, 1897.

Notice is hereby given that the plaintiff above named excepts to the sufficiency of the London Company as surety upon the appeal bond (so called) filed with the clerk of said court in said action by the defendants above named on the 9th day of April, 1897, and plaintiff does not accept said bond.

Plaintiff also excepts to the sufficiency of said London Company for the reason that it is not shown that it is authorized or empowered to become surety on bonds.

Plaintiff also excepts to said bond for the reason that the said surety thereon has not justified thereon or made or filed its affidavit that it is worth the amount for which it has become surety in said bond as required by law.

Plaintiff also excepts to said bond for the reason that it is insufficient in amount and is not in double the amount of plaintiff's judgment.

THOS. ARMSTRONG, JR.,
Attorney for Plaintiff.

145 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS, A. L. JOHNS, W. A. Daggs, and A. J. Daggs, Defendants.

Notice Justification to Sureties. Filed April 16th, 1897.

To R. E. Daggs and A. J. Daggs, attorney for A. L. Johns, W. A. Daggs, and A. J. Daggs, defendants above named:

You will take notice that the plaintiff above named filed with me on the 10th day of April, 1897, his refusal to accept the supersedeas bond filed by you in the above-entitled action on the 9th day of April, 1897, on appeal to the supreme court of Arizona, and his exceptions thereto and to the sureties thereon.

And you are further notified that the surety or sureties in said bond or other sureties are required to appear before the Hon. A. C. Baker, judge of said court, at the court-room of said court, in the court-house, in the city of Phœnix, Maricopa county, Arizona Territory, at 9 o'clock in the forenoon of Saturday, the 17th day of April, 1897, and justify on said bond.

Dated April 12, 1897.

J. E. WALKER,
Clerk of the District Court of Maricopa County, Arizona Territory.

OFFICE OF THE SHERIFF, }
County of Maricopa. }

I hereby certify that I received the within notice on the 15th day of April, 1897, at the hour of 2.20 p. m., and personally served the same on the 15th day of April, A. D. 1897, on A. J. Daggs, and on R. E. Daggs on the 16th day of April, 1897, being the parties named in this notice, by delivering to each of the above-named parties, in the city of Phœnix, county of Maricopa, a true copy of this notice.

Dated April 16th, 1897.

L. H. ORME, *Sheriff*,
By J. E. BOYD, *Deputy*.

146 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON ET AL. } Motion to Set Aside Order Disapproving
vs. } Defendants' Appeal Bond. Filed May
A. L. JOHNS ET AL. } 27th, 1897.

Comes defendant A. J. Daggs and moves the court to vacate and set aside the order made in this cause by this court on 25th day of May, 1897, purporting to disapprove defendants' appeal bond, filed April 9, 1897, for the following reasons:

I.

Because said court had no jurisdiction to make said order.

II.

Because the so-called statement of facts stated in said order are not true.

III.

Because the reputed notices of justification were not served on defendant.

IV.

Because the plaintiff had waived all right to justify said sureties, if any right there be.

V.

Because said order is void.

A. J. DAGGS,
Att'y for Def't.

147 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON (Pl't'f), Defendant in Error, vs. A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs (Def'ts), Plaintiffs in Error.	Case No. 2327. Filed Dec. 20th, 1897, at 3 o'clock p. m.

Petition in Error.

To Edwin S. Gill, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa:

I.

Your petitioners state that plaintiffs in error R. E. Daggs, A. J. Daggs, and W. A. Daggs are residents of Maricopa county, Arizona Territory, plaintiff in error A. L. Johns is a resident of Chicago, Cook county, State of Illinois, and that the defendant in error, James Wilson, is a resident of Palatin, Cook county, State of Illinois; that Thomas Armstrong, Jr., is the attorney of record of the defendant in error, James Wilson, and said attorney resides in Phœnix, Maricopa county, Territory of Arizona.

II.

Your petitioner- would further show that in the above court in the above numbered and entitled cause that the above (plaintiff) defendant in error above named, to wit, on the 21st day of December, A. D. 1896, the same being a day of the regular Nov. term of the above-entitled court, obtained a judgment for the recovery of and from the plaintiffs in error, R. E. Daggs, A. J. Daggs,
148 A. L. Johns, and W. A. Daggs, the principal sum of eight thousand five hundred and forty-one dollars and thirteen cents ($8,541.13), with interest on the sum of six thousand five hundred dollars ($6,500.00), at the rate of eight per cent. per annum, from Dec. 21st, 1896, until paid; with interest on two thousand and forty-one dollars and thirteen cents ($2,041.13) from Dec. 21, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (plaintiff's) defendant's in error mortgage in the said action described as against all of the plaintiffs in error, and for the costs of suit, taxed at one hundred and seventeen dollars ($117.00). Defendant in error also obtained upon May 25th, 1897, that being a regular law day of the May term of said court, an order against the plaintiffs in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error.

III.

Your petitione- further alleges and shows that in the proceedings and during the trial of said cause manifest error hath happened to the great damage and prejudice of your petitioners, and your peti-

tioners desire that said cause be removed to our supreme court for revision and correction.

Your petitioners therefore pray that a summons issue to the defendant in error and his attorney, Thos. A. Armstrong, Jr., his attorney of record, that they have due notice hereof according to law.

A. J. DAGGS,
Att'y for Def'ts.

149 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON (Pl't'f), Defendant in Error,
vs.
A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs (Def'ts), Plaintiffs in Error.

Case No. 2327. Filed Dec. 20, 1897, at 3 o'clock p. m.

Cost Bond in Error.

Whereas in the above numbered and entitled cause pending in the district court of Maricopa county, and at a regular term of said court, to wit, on the 21st day of December, A. D. 1896, the said James Wilson (pl't'f), defendant in error, recovered a judgment against R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns for the sum of eight thousand five hundred and forty-one dollars and thirteen cents ($8,541.13), with interest on the sum of six thousand five hundred dollars ($6,500.00), at the rate of eight per cent. per annum, from Dec. 21st, 1896, until paid, with interest on two thousand and forty-one dollars and thirteen cents ($2,041.13) from Dec. 21st, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (pl't'f's) defendant in error's mortgage in the said action described as against all of the plaintiffs in error, and for the costs of suit, taxed at one hundred and seventeen dollars ($117.00); defendant in error also obtained upon May 25th, 1897, that being a regular law day of the May term of said court, an order
150 against the plaintiffs in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error—

From which judgment and order the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs have sued out a writ of error to our supreme court:

Now, therefore, we, A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, as principal-, and The London Company, as surety, acknowledge ourselves bound to pay the said James Wilson the sum of three hundred and fifty dollars ($350.00), conditioned that the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, plaintiffs in error, will prosecute their writ of error with effect and

shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 20th day of Dec., A. D. 1897.

A. L. JOHNS, [SEAL.]
By A. J. DAGGS, *His Attorney.*
W. A. DAGGS, "
By A. J. DAGGS, *His Attorney.*
A. J. DAGGS. "
R. E. DAGGS. "
THE LONDON CO., "
By R. E. DAGGS, *Secretary.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs, being duly sworn, says that he is the secretary of the London Company, a corporation, organized and existing under the laws of Arizona Territory, and makes this affidavit for it
151 on its behalf and in its stead; that said corporation has power and authority by its charter to execute the foregoing bond; that he knows of his own knowledge that said corporation is worth the amount for which it has become liable over and above its just debts and liabilities, exclusive of property exempt from execution.

R. E. DAGGS.

Subscribed and sworn to before me this 20th day of Dec., A. D. 1897.

IDA I. WOODWORTH,
Notary Public.

[NOTARY SEAL.]

My commission expires Oct. 21, 1900.

I have fixed the probable amount of the costs of the suit and order of both appellate and the court below at one hundred and seventy-five dollars ($175.00), and approve the foregoing bond this 20th day of December, A. D. 1897.

____ ____,
Clerk of the District Court of Maricopa County, Arizona Ter.

152 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON (Pl'tf), Defendant in Error,
vs.
A. L. JOHNS, R. E. DAGGS, A. J. Daggs, and W. A. Daggs (Def'ts), Plaintiffs in Error.

Case No. 2327. Summons in Error. Filed Dec. 21st, 1897, at 2 o'clock p. m.

In the name of the Territory of Arizona, to L. H. Orme, sheriff, or any constable of Maricopa county, Greeting:

You are hereby commanded to summons James Wilson, who resides at Palatin, Cook county, Illinois, or Thomas Armstrong, Jr.,

his attorney of record, who resides at Phœnix, Maricopa county, Arizona Territory, to be and appear before our supreme court at the next regular term thereof, to be held in the city of Phœnix on the second Monday of January, A. D. 1898, being the tenth day of January, and then and there defend a writ of error granted on petition of A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs against James Wilson, defendant in error therein, and filed in this court on the twentieth day of Dec., A. D. 1897, praying a revision and correction of a certain judgment, which judgment is as follows, to wit: "In the above numbered and entitled cause, pending in the district court of Maricopa county and at a regular term of said court, to wit, on the 21st day of December, A. D. 1896, the said James Wilson (pl't'f) defendant in error, recovered a judgment against A. L.
153 Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs for the sum of eight thousand five hundred and forty-one dollars and thirteen cents ($8,541.13), with interest on the sum of six thousand five hundred dollars ($6,500.00), at the rate of eight per cent. per annum, from Dec. 21st, 1896, until paid, and with interest on two thousand and forty-one dollars and thirteen cents ($2,041.13) from Dec. 21st, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (pl't'f's) defendant in error's mortgage in the said action described as against all of the plaintiffs in error, and for the costs of suit, taxed at one hundred and seventeen dollars ($117.00)." Defendant in error also obtained upon May 25th, 1897, that being a regular law day of the May term of said court, an order against the plaintiffs in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error.

Herein fail not, but of this writ make due return within sixty days of the date hereof, showing how you have executed the same.

Issued this 20th day of December, 1897.

Witness Edwin S. Gill, clerk of the district court, Maricopa county, Arizona Territory.

Given under my hand and seal of said court, at my office in Phœnix, Arizona, this the 20th day of Dec., 1897.

[District Court Seal.]

EDWIN S. GILL,
Clerk of Dist. Court.

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

154 I hereby certify that I received this summons on the 21st day of December, 1897, at 1.40 o'clock p. m., and personally served the same on 21st day of December, 1897, on Thomas Armstrong, Jr., being the attorney of record in this case and named in this summons, by delivering to him, the said Thomas Armstrong, Jr., a true copy of this summons, with a true copy of the petition in error, filed in this case Dec. 21st, 1897.

L. H. ORME, *Sheriff*,
By C. H. SLANKARD, *Deputy*.

In the Supreme Court of the Territory of Arizona on Appeal from the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff, Defendant in Error, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. Daggs, and W. A. Daggs, Defendants, Plaintiffs in Error.	Case No. 2327. Exceptions to Bond on Writ of Error and Surety Therein. Filed Dec. 24, 1897, at 1.30 o'clock p. m.

To Edwin S. Gill, clerk of the district court above named:

Please to take notice that the plaintiff and defendant in error in the above-entitled cause hereby objects to the sufficiency of that certain bond for costs taken by you in the above-entitled cause and filed with you on the 20th day of December, 1897, by the above-named plaintiffs in error and defendants, and you are hereby notified that said plaintiff and defendant in error does not accept
155 said bond and expressly excepts to the form thereof and to the sufficiency of the surety thereon, and also excepts to such bond for the further reason that there is but one surety upon said bond, and that surety has not qualified and is not entitled to qualify as surety thereof in the manner required by law.

Dated December 24th, 1897.

THOS. ARMSTRONG, JR.,
Attorney for Plaintiff and Defendant in Error.

Of this, also, the defendants and plaintiffs in error will also take notice.

Office of sheriff of Maricopa county.

PHŒNIX, ARIZONA, *Dec. 27th*, 1897.

I hereby certify and return that I received this "notice to qualify" on the 27th day of December, 1897, at 11.30 a. m., and have personally served the same on A. J. Daggs, A. L. Johns, R. E. Daggs, and W. A. Daggs (def'ts), plaintiffs in error *named* herein, by delivering to A. J. Daggs (for himself and for A. L. Johns and W. A. Daggs) three copies of this notice, and by delivering to R. E. Daggs one copy of this notice, at the county of Maricopa, Arizona, on the 27th day of December, 1897.

L. H. ORME, *Sheriff.*
H. L. GEORGE, *Deputy.*

156 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON (Plaintiff), Defendant in Error, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs (Defendants), Plaintiffs in Error.	Case No. 2327 Notice to Qualify on Bond. Filed Dec. 27th, 1897, at 2.40 o'clock p. m.

To A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, plaintiffs in error in said action:

You are hereby notified that the plaintiff and defendant in error in the above entitled cause has filed with me a notice that *that* he does not accept the bond in error in said cause given to secure the probable costs on appeal to the supreme court of this Territory and filed by you on the 20th day of December, A. D. 1897, together with his exception to the surety on said bond.

In accordance therewith I have appointed Thursday, December 30th, 1897, before the Hon. Webster Street, judge of said court, at the hour of 9.30 o'clock a. m. of said day, or as soon thereafter as may be, said court being then in regular session, as the time and place when and where said surety shall appear and justify as to its competency and sufficiency as surety on said bond.

Dated this 27th day of December, A. D. 1897.

EDWIN S. GILL,
Clerk of said District Court.

[COURT SEAL.]

157 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON (Pl't'f), Def't in Error, *vs.* A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs (Def'ts), Plaintiffs in Error.	Case No. 2327. Filed January 8th, 1898.

Supplemental Amended Bond on Error.

Whereas in the above numbered and entitled cause pending in the district court of Maricopa county and at a regular term of said court, to wit, on the 21st day of December, A. D. 1896, the said James Wilson (pl't'f), defendant in error, recovered a judgment against R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns for the sum of eight thousand five hundred and forty-one dollars and thirteen cents ($8,541.13), with interest on the sum of six thousand five hundred dollars ($6,500.00), at the rate of eight per cent. per annum, from Dec. 21st, 1896, until paid; with interest on two thousand and forty-one dollars and thirteen cents ($2,041.13) from Dec. 21st, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (pl't'f's) defendant in error's mortgage

in the said action described as against all of the plaintiffs in error, and for the costs of suit, taxed at one hundred and seventeen dollars ($117). Defendant in error also obtained upon May 25th, 1897, that being a regular law day of the May term of said court,
158 an order against the plaintiffs in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error—

From which judgment and order the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs have sued out a writ of error to our supreme court and duly filed therein their cost bond in error on the 20th day of December, 1897, and the defendant in error having excepted to the same and notice having been given to qualify the said bond before the court on the 31st day of Dec., and the court on said day having ordered the plaintiff in error to file supplemental bond with additional sureties, and in compliance with said order this bond is made:

Now, therefore, we, A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, as principal-, and Wm. M. Billups and W. K. James, as sureties, acknowledge ourselves bound to pay the said James Wilson the sum of three hundred and fifty dollars ($350.00), conditioned that the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, plaintiffs in error, will prosecute their writ of error with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 7th day of Jan'y, A. D. 1898.

A. L. JOHNS, by A. J. DAGGS, *His Attorney.*
W. A. DAGGS, " " " " " "
A. J. DAGGS.
R. E. DAGGS.
WM. M. BILLUPS.
W. K. JAMES.

159 TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

Wm. M. Billups and W. K. James, sureties on the above and foregoing bond, being duly sworn each for himself and not one for the other, says that he is a resident and householder of the county of Maricopa, Territory of Arizona, and is worth the amount for which he has become liable as surety over and above all his just debts and liabilities, exclusive of property exempt from execution.

WM. M. BILLUPS.
W. K. JAMES.

Subscribed and sworn to this 8 day of Jan., A. D. 1898.

IDA I. WOODWORTH,
[NOTARY SEAL.] *Notary Public.*

Com. ex. Oct. 21, 1900.

Bond and sureties approved this 8th day of January, 1898.

WEBSTER STREET, *Judge.*

160 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
A. L. JOHNS ET AL., Defendants. } Notice of Time of Justification of Sureties on Bond in Error.

To the plaintiff or his attorney, Thos. Armstrong, Jr.:

Take notice that the defendants will present the bond for cost on error in above-entitled cause to the Hon. Webster Street for approval and justification of the surety on the 30th day of Dec., A. D. 1897, at 9.30 o'clock a. m., or as soon thereafter as the matter can be heard.

A. J. DAGGS,
Att'y for Defendants.

I, John Beck, do hereby certify that I served the above and foregoing notice on Thos. Armstrong, Jr., the attorney of record of James Wilson, by delivering a true copy to the said Armstrong in person at 8.50 o'clock of the 30th day of December, 1897.

JOHN BECK,
Constable of Phœnix Precinct, Maricopa Co., Ariz.

161 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS ET AL., Defendants. } Case No. 2327. Orders and Minute Entries.

Be it remembered during progress of this cause the following orders and minutes were made:

JUNE 24TH, 1895.

On motion of A. J. Daggs, it was ordered by the court that the hearing of the appointment of a receiver in this case be set for Thursday, June 27th, 1895.

NOVEMBER 5TH, 1895.

Demurrer set for hearing at 2 o'clock p. m. today.
Trial by jury demanded by defendants.

NOV. 5TH, 1895.

The demurrers to the complaint in the cause came on to be heard, Thos. Armstrong, Jr., appearing for the plaintiff and A. J. Daggs appearing for the defendants. Said demur-s were argued to the court by counsel, and to be submitted on briefs to be filed. It appearing to the court that this is a proper case to be tried by the court, it is therefore ordered that the demand made by the
162 defendants for trial by a jury be, and is hereby, disallowed; to which ruling of the court defendant excepts.

JAN'RY 6TH, 1896.

The demurrer to the compalint in this cause having heretofore — argued, submitted, and by the court taken under advisement: now,

on this day, after due consideration, it is ordered by the court that the demurrer be overruled.

NOV. 6TH, 1896.

Demurrer set for hearing at 1.30 o'clock p. m. today.

NOV. 6TH, 1896.

The demurrer to the complaint in this cause was argued to the court be A. J. Daggs for the defendants and Thos. Armstrong, Jr., for the plaintiff, submitted, and by the court overruled.

NOV. 27TH, 1896.

Set for trial Dec. 21st, 1896.

DEC. 21ST, 1896.

The motion of defendants for the continuance of the trial of this cause was presented and by the court overruled; also motion for change of venue by defendants was presented and by the court overruled.

163 DEC. 21ST, 1896.

This cause came regularly on for trial by the court, the plaintiff appearing by his counsel, Thos. Armstrong, Jr., and the defendants present by their counsel, A. J. Daggs, Esq. Plaintiff offered the record in case 1954, and J. W. Evans, R. E. Daggs, & F. W. Sheridan were called, sworn, and examined as witness- for the plaintiff and cross-examined by the defendant-, and documentary evidence offered by the plaintiff. Plaintiff rests. The defendants, by their counsel, moved the court for a judgment for defendants upon the pleadings. Motion overruled by the court and defendants excepts. The defendants did not offer any evidence. Cause was then submitted upon pleadings and proofs adduced, and the court, being fully advised in the premises and having duly considered the same, orders judgment to be entered for the plaintiff.

MAR. 20TH, 1897.

The motion for a new trial in this cause was presented and by the court overruled; to which ruling of the court defendants excepts and gave notice in open court of an appeal from the judgment and order denying motion for new trial to the supreme court of the Territory of Arizona.

APR. 30, 1897.

Court adjourned *sine die*.

164 MAY 25TH, 1897.

The matter of the justification of the surety upon the appeal bond filed by A. J. Daggs herein on Apr. 9th, 1897, having been duly noted for hearing before the Hon. A. C. Baker, judge of this court, at the court-rooms of said court, in the court-house, in the city of Phœnix, Maricopa county, Arizona Territory, on Apr. 17th, 1897, at 9 o'clock a. m., and the said surety having failed to appear at said time and place, or at all, to justify as required by law, it is ordered that the said bond be disapproved.

JUNE 18TH, 1897.

The motion of defendants to set aside order disapproving appeal bond in this case was presented, and by the court overruled; to which ruling of the court defendants excepts, and gave notice of an appeal to the supreme court of the Territory of Arizona from the order denying motion to set aside order disapproving appeal bond.

DECEMBER 31, 1897.

Comes now James Wilson, by Thos. Armstrong, Jr., his attorney, and announces to the court that he is prepared to proceed with the justification of the surety and the hearing of his exception to the bond for costs filed by the defendant- in their writ of error herein, pursuant to notice served, that the surety would justify on said bond, this being the first opportunity offered to hear the same at or
165 after December 30, 1897. R. E. Daggs, secretary of the surety, the London Company, and the person who signed the surety bond herein as such secretary, was present in court, and was requested in open court by counsel for plaintiff to proceed with the justification pursuant to notice; and the said R. E. Daggs, secretary of the London Company, offering to justify — said surety on said bond, the court refuses to allow such justification, the court holding that the said London Company is not a surety company as contemplated by the statute and cannot by its charter become surety on bonds. The court thereupon ordered that the said bond for costs filed herein be and the same is disapproved and such surety held to be insufficient as surety, and said bond is held for naught. On motion, defendants were granted leave to file a bond with new sureties by Saturday, Jan. 8, 1898; to which ruling of the court allowing defendant- to file a bond with new sureties plaintiff, by its counsel, duly excepts.

JAN. 8, 1898.

Comes now the above-named defendants and present to the court their bond on writ of error herein with new sureties, which by order of the court heretofore made said defendants were granted leave to file at this time, and the court, having examined said bond and being satisfied with the sufficiency of the sureties thereon, approves said bond and orders that it be filed.

166 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES WILSON, Plaintiff,
vs.
R. E. DAGGS ET AL., Defendants. } Case No. 2327. Clerk's Certificate.

I, Edwin S. Gill, clerk of the above-entitled court, do hereby certify that the above and foregoing record papers of above-entitled court in above numbered and entitled cause contains all the original papers on file in my office, including all exhibits offered at the trial of said cause, with a full and complete transcript of all orders and minute entries appearing on the records of above-en-

titled court in above numbered and entitled cause, including the order adjourning the November term, 1896, of said court, made according to rule three of our supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of the said district court this 10th day of Jan'y, A. D. 1898.

[DISTRICT COURT SEAL.] EDWIN S. GILL,
Clerk of the District Court of the Third Judicial District, Maricopa County, Arizona Ter.

167 *Caption.*

Deposition of A. L. Johns, a witness sworn and examined under and by virtue of the commission issued out of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, in said Territory of Arizona, in a certain cause therein pending between Benjamin Goldman, plaintiff, and W. A. Daggs, P. P. Daggs, R. E. Daggs, A. L. Johns, A. J. Daggs, and P. J. Cole, defendants.

A. L. JOHNS, of the city of Chicago, State of Illinois, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows:

A. L. JOHNS, who being first duly sworn, answers as follows, to wit:

Ans. — Int. 1st. Chicago, Cook county, Illinois; A. L. Johns; live stock commission and real estate; 33 years.

Ans. to Int. 2d. I am.

Ans. to Int. 3d. I am not; only as his name appears in the abstract furnished me by Mr. Daggs.

Ans. to Int. 4th. With A. J. Daggs only.

Ans. — Int. 5th. I did.

Ans. to Int'y 6th. I purchased from Robert E. Daggs, through his agent, A. J. Daggs, and paid the sum of two thousand five hundred and fifty dollars for the land described and the water rights connected therewith.

168 Ans. to Int'y 7th. I have paid the money in full for land and water and hold receipts in full for the same.

Ans. to Int'y 8th. I paid the purchase-money when I received the warranty deed of the land, March 17th, 1894.

Ans. to Int'y 9th. Yes; the abstracts were furnished me and I had them passed upon by an attorney.

Ans. to Int'y 10th. No, sir; I never had any information to that effect whatever until I received through the mail a copy of petition purporting to bring suit for the purchase price of said lands, some time about the 1st of June.

Ans. — Int'y 11th. I do not.

— — Int'y 12th. I have sold the above-described land to A. J. Daggs, Scotland county, Missouri, for the price and consideration of twenty-six hundred dollars, which sum I have received in full in cash.

Ans. to Int'y 13. As I have stated in previous ans., I have sold

the above lands, got my pay in full, and received payments in cash.

Ans. to Int'y 14th. I have stated all the facts relating to the purchasing and selling of this land.

Cross-examination:

Ans. to Int'y 1st. None at all.

Ans. to Int'y 2d. I have known A. J. Daggs since February or March, 1894.

Ans. to Int'y 3d. I was.

Ans. to Int'y 4th. Live-stock commission and real estate.

Ans. to Int'y 5th. I am subject to rheumatism in Chicago
169 climate. I decided to change climate and pass the winters in a warmer country, and, being acquainted with the climate in the southwestern portion of the United States, I advertised in the Chicago Drovers' Journal for lands in the southwest—New Mexico or Arizona preferred—thinking to engage in the winter season in the maturing and fattening of stock and hold them there on alfalfa for the high spring markets in Chicago, and on shipment in the spring return to my business here. I received numerous letters from southern districts, together with a personal call from A. J. Daggs, representing himself as the agent of Robert E. Daggs. He stated he had seen my advertisement in the Chicago Drovers' Journal and had called upon me for the purpose of offering some lands in the Salt River valley, Maricopa county, Arizona Territory. He showed me maps of that country, and after some considerable examination and talk I concluded, and so informed Mr. Daggs, that I — purchase his hundred-acre tract and a tract adjoining Tempe known as the Wilson tract, as the hundred-acre tract in section 19 above described was under the Tempe canal; that I was acquainted with this canal and knew it to be one of the oldest and best canals in the valley; provided he would furnish me abstracts of title showing the land to be clear and unincumbered. The abstracts Mr. Daggs furnished, as requested, and I submitted them to my attorney and instructed him to examine them carefully and to report to me his conclusion. In a day or two my attorney brought the abstracts to my office and informed me, as far as he could ascertain from the
170 abstracts, that the lands in question were free and unincumbered. I thereupon saw Mr. A. J. Daggs and informed him that his money was ready for his 100-acre tract and the water rights connected therewith in the Tempe canal whenever he delivered me a warranty deed for both land and water. He produced the deeds on or about the 17th of March, A. D. 1894, and I paid him $2,550 in cash, the price agreed, and took his deeds; also his receipt for money in full.

Ans. to In'y 5th. I paid for land and water rights at the time the deed was delivered to me, 17th of March, 1894; A. J. Daggs, as agent for Robert E. Daggs, at my office in Chicago, Cook county, Illinois, in cash, and received receipt in full.

A. L. JOHNS.

Subscribed and sworn to before me this 6th day of Oct., A. D. 1894.

[COMMISSIONER OF DEEDS SEAL.]

SIMEON W. KING,
Commissioner for Arizona, at Chicago, in Illinois.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

BENJAMIN GOLDMAN, Plaintiff,
vs.
W. A. DAGGS, P. P. DAGGS, R. E. DAGGS, A. L. Johns, A. J. Daggs, and P. J. Cole, Defendants.

Notice of Application to take Deposition of A. L. Johns.

To Benjamin Goldman:

Please take notice that on 24th day of September, 1894, the defendants in the above-entitled action will apply to the clerk
171 of the said court for a commission to take the deposition of the defendant A. L. Johns, who resides at Chicago, State of Illinois, in answer to the following interrogatories, said deposition to be used in the evidence in the above-entitled cause, to wit:

Interrogatory 1st. Where do you reside, and what is your name, age, and occupation?

Interrogatory 2nd. Are you one of the defendants in the above-entitled cause?

Interrogatory 3rd. Are you acquainted with the plaintiff in the above-entitled cause?

Interrogatory 4th. Are you acquainted with your codefendants in the above-entitled cause?

Interrogatory 5th. During the month of March, 1894, did you or did you not purchase one hundred acres, more or less, of the northwest one-fourth (¼) of section nineteen (19), township one (1) south, of range five (5) east, of Gila and Salt River base and meridian, in Maricopa county, Arizona Territory?

Interrogatory 6th. If you state in your answer to interrogatory 5th that you did purchase the land described in said interrogatory, state from whom you purchased and what you paid therefor.

Interrogatory 7. If you state in your answer to interrogatory 5 that you purchased the land mentioned therein, state whether or not you have paid the purchase-money in full.

Interrogatory 8. If you state in answer to interrogatory 7 that you paid the purchase-money, state when you paid it.

Interrogatory 9. If you state in answer to the above interrogatory that you purchased said land, state whether abstracts were furnished you, and whether or not you had the abstracts, if one was
172 furnished you, passed upon by an attorney or abstractor.

Interrogatory 10. Did you ever have, previous to the bringing of this suit, any information to the effect that the purchase-money for the above-described land had never been paid to the plaintiff in this action?

Interrogatory 11. Do you now own the above-described land?

Interrogatory 12. If, in answer to interrogatory 11, you answer you do not own the land, you may state what you have done with the same.

Interrogatory 13. If, in your answer to interrogatory 12, you answer that you have sold the land, state to whom you have sold it, at what price, and whether or not the purchase price has been fully paid.

Interrogatory 14. State any facts within your knowledge which may be material to either plaintiff or defendants in the above-entitled action.

L. H. CHALMERS,
Att'y for Def'ts.

In the District Court of the Third Judicial District, Maricopa County.

BENJAMIN GOLDMAN, Plaintiff,
vs.
W. A. DAGGS ET AL.

Cross-interrogatories to be Propounded to the Witness A. L. Johns.

(1.)

What relation are you, by blood or marriage, to the Daggs' who are defendants?

173 (2.)

How long have you known the Daggs'?

(3.)

Were you ever at Tempe, in this county and Territory?

(4.)

What is your business or occupation?

(5.)

State fully how you came to purchase the land described in the direct interrogatories. State fully.

(6.)

If you have answered that you purchased and paid for the aforesaid land, state fully when you paid for the same, who you paid, where you paid, and how the payment was made, if in cash or by draft. Answer fully.

FITCH & CAMPBELL,
Attorneys for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

The Territory of Arizona to any clerk of a court of record having a seal, a notary public, or any commissioner of deeds, duly appointed under the laws of the Territory in and for the county of Cook, State of Illinois, Greeting:

We hereby authorize and require you or either of you to summons A. L. Johns, a resident of your county, to come before you forthwith, and that you then and there take his answers, under oath, to the attached copy of direct and cross interrogatories,
174 and that you return the same without delay to the clerk of this court, as herein provided:

1. That you reduce his answers so taken to writing in proper form and cause the same to be subscribed and sworn to by said witness.

2. That you certify under your hand and seal of office that said answers were sworn to and subscribed before you.

3. That you seal up in an envelope the answer so taken, together with the annexed interrogatories and this commission, with your name across the seal.

4. That you endorse on the envelope the names of the parties to this suit and the name of said witness.

5. That you direct the package to the clerk of the district court of the third judicial district, Territory of Arizona, in and for the county of Maricopa, at Phœnix, Arizona.

6. That if said package is sent by mail the postmaster or his deputy shall endorse thereon that he received it from your hands and sign his name thereto, or if you entrust it to private conveyance, as provided by the statute, you will apprise the person receiving it that it must be delivered to the clerk of this court by himself in person, which evidence, so t ken as above, is to be used on the trial of a suit now pending in the district court of the third judicial district in and for the county of Maricopa, wherein Benjamin Goldman is plaintiff and W. A. Daggs *et al.* are defendants.

Herein fail not, but make due return of this writ.

175 Given under my hand and seal of the district court of the third judicial district, Territory of Arizona, in and for the county of Maricopa, this 25th day of September, 1894.

[District Court Seal.]

J. E. WALKER, *Clerk.*
By LEWIS JORDAN,
Deputy Clerk.

Issued Sept. 25, 1894.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Simeon W. King, a commissioner named in said commission, or rather to whom said commission and interrogatories were addressed, do hereby certify that the witness A. L. Johns, above named, ap-

peared before me, and after being duly sworn his evidence was duly taken down in my presence on the 6th day of October, A. D. 1894, at my office, No. 3 Methodist Church block, in the city of Chicago, in said county and State aforesaid; that I have personal knowledge of the identity of said witness, and that the said answers to the direct and cross interrogatories were subscribed before me by said witness, A. L. Johns, and that said answers were reduced to writing by Wm. E. Buckner, a disinterested person in my employ and under my direction, in the presence of the said witness and myself as such commissioner.

In witness whereof I have hereunto set my hand and official seal this 10th day of October, A. D. 1894.

[Commissioner's Seal.]

SIMEON W. KING,
A Commissioner of Deeds in the Territory of Arizona, Residing in the City of Chicago, County of Cook and State of Illinois.

176 Fees for taking above deposition, including oaths, caption, certificate, special deputy fees, seal, attendance, two copies of the evidence or deposition, and postage, &c., $12.50.

Paid by A. J. Daggs on behalf of def'ts.

S. W. KING,
Commissioner.

UNITED STATES, }
City of Chicago, Cook Co., } *ss:*

Before Simeon W. King, commissioner in and for said State, Arizona Territory.

To the sheriff of Cook Co., Illinois, or any special deputy, Greeting:

We command you to summon M. E. Campbell, if he shall be found in your State, personally to be and appear before the undersigned, a commissioner in and for said State, at his office, No. 107 South Clark street, room 3, in said city of Chicago, on the 6th day of Oct., A. D. 1894, at 2 o'clock p. m., to testify — the truth to speak in a certain cause pending in the district court of the 3rd judicial district of the Territory of Arizona in and for the county of Maricopia, wherein Benjamin Goldman — plaintiff and A. L. Johns *et al.* defendants, on the part of said defendants.

And this he shall not omit under the penalty of the law, and have you then and there this writ.

Given under my hand and official seal at said city of Chicago, in said State, this 6 day of Oct., A. D. 1894.

SIMEON W. KING,
[COMMISSIONER'S SEAL.] *A Commissioner in Illinois for Arizona Territory.*

177 CHICAGO, *Oct. 6th*, 1894.

Wm. E. Buckner:

You are hereby appointed a special deputy to serve the within subpœna on the within-named witness, M. E. Campbell and make due return according to law.

SIMEON W. KING,
Commissioner, &c.

Having this day been appointed special deputy in the within cause to serve the within-named M. E. Campbell, I hereby certify that I have made diligent search for said witness and he cannot be found at his usual place of abode.

W. E. BUCKNER,
Special Deputy.

Chicago, Ill., Oct. 6, A. D. 1894.

Fee for deputy, $1.50.
Paid by def'ts.

S. W. KING,
Commissioner.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES C. GOODWIN, Plaintiff, *vs.* W. A. DAGGS, P. P. DAGGS, R. E. Daggs, M. E. Campbell, A. J. Daggs, and P. J. Cole, Defendants.	Notice of Application to Take Deposition of M. E. Campbell & Interrogatories.

To James C. Goodwin:

178 Please take notice that on the 24th day of September, 1894, defendants in the above-entitled action will apply to the clerk of the said court for a commission to take the deposition of the defendant M. E. Campbell, who resides at Chicago, in the State of Illinois, in answer to the following interrogatories; said deposition to be used in evidence in the above-entitled cause, to wit:

Interrogatory 1st. Where do you reside and what is your name, age, and occupation?

Interrogatory 2nd. Are you one of the defendants in the above-entitled cause?

Interrogatory 3rd. Are you acquainted with the plaintiff in the above-entitled cause?

Interrogatory 4. Are you acquainted with your codefendants in the above-entitled cause?

Interrogatory 5th. During the month of March, 1894, did you or did you not purchase the southwest (¼) one-fourth of section twenty-two, township one (1) south of range four (4) east of Gila and Salt River base and meridian, in Maricopa county, Arizona Territory?

Interrogatory 6th. If you state in your answer to interrogatory 5 —, state from whom you purchased and what you paid therefor.

Interrogatory 7. If you state in your — interrogatory 5 that you purchased the land mentioned therein, state whether or not you have paid the purchase-money in full.

Interrogatory 8. If you state in answer to interrogatory 7 that you have paid the purchase-money, state when you paid it.

179 Interrogatory 9. If you state in answer to the above interrogatory that you purchased said land, state whether abstracts were furnished you, and whether or not you had the abstract, if one was furnished, passed upon by an attorney or abstractor.

Interrogatory 10. Did you ever have, previous to the bringing of this suit, any information to the effect that the purchase-money for the above-described land had never been paid to the plaintiff in this action.

Interrogatory 11. Do you now own the above-described land?

Interrogatory 12. If, in answer to interrogatory 11, you answer you do not own the land, you may state what you have done with the same.

Interrogatory 13. If, in answer to interrogatory 12, you answer that you have sold the land, state to whom you have sold it, at what price, and whether or not the purchase price has been fully paid.

Interrogatory 14. State any facts within your knowledge which may be material to either plaintiff or defendants in the above-entitled action.

L. H. CHALMERS,
Att'y for Def'ts.

In the District Court of the Third Judicial District, Maricopa County.

JAMES C. GOODWIN, Plaintiff,
vs.
W. A. DAGGS ET AL., Defendants.

Cross-interrogatories to be Propounded to the Witness M. E. Campbell.

180 (1.)

What relation are you by blood or marriage to the defendant Daggs?

(2.)

How long have you known the Daggs'?

(3.)

Were you ever at Tempe, in this county and Territory?

(4.)

What is your business or occupation?

(5.)

State fully how you came to purchase the land described in the interrogatories.

(6.)

If you have answered that you purchased and paid for said land, state fully when you paid for the same, who you paid, where you paid, and how the payment was made, if in cash or by draft. Answer fully.

FITCH & CAMPBELL,
Attorneys for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

The Territory of Arizona to any clerk of a court of record having a seal, a notary public, or any commissioner of deeds duly appointed under the laws of the Territory in and for the county of Cook, State of Illinois, Greeting:

We hereby authorize and require you or either of you to
181 summons M. E. Campbell, a resident of your county, to come before you forthwith, and that you then and there take his answers, under oath, to the attached copy of direct and cross interrogatories, and that you return the same without delay to the clerk of this court, as herein provided:

1. That you reduce his answers so taken to writing, in proper form, and cause the same to be subscribed and sworn to by said witness.

2. That you certify, under your hand and seal of office, that said answers were sworn to and subscribed before you.

3. That you seal up in an envelope the answer so taken, together with the annexed interrogatories and this commission, with your name across the seal.

4. That you endorse on the envelope the names of the parties to this suit and the name of said witness.

5. That you direct the package to the clerk of the district court of the third judicial district, Territory of Arizona, in and for the county of Maricopa, at Phœnix, Arizona.

6. That if said package is sent by mail the postmaster or his deputy shall endorse thereon that he received it from your hands, and sign his name thereto; or if you entrust it to private conveyance, as provided by the statute, you will apprise the person receiving it that it must be delivered to the clerk of this court by himself in person, which evidence, so taken as above, is to be used on the trial
of a suit now pending in the district court of the third judi-
182 cial district in and for the county of Maricopa, wherein James C. Goodwin is plaintiff and W. A. Daggs *et al.* are defendants.

Herein fail not, but make due return of this writ.

Given under my hand and seal of the district court of the third

judicial district, Territory of Arizona, in and for the county of Maricopa, this 25th day of September, 1894.

J. E. WALKER, *Clerk*,
By LEWIS JORDAN,
Deputy Clerk.

[COURT SEAL.]

Issued Sept. 25, 1894.
Filed Oct. 15th, 1895.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS, A. L. JOHNS, W. A. DAGGS, and A. J. Daggs, Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

Motion of Appellee to Dismiss the Appeal. Filed January 11th, 1898.

Comes now the appellee in the above-entitled cause and moves the court to dismiss the appeal in the above-entitled action for the following reasons:

1. That an appeal was formerly taken by these plaintiffs in error from the same judgment herein sought to be brought up to this court for review and a supersedeas bond filed therein; which appeal was afterward abandoned and this writ of error sued out.

183 2. That an application is now pending before this court to affirm the judgment herein on a short transcript issued on the appeal of the plaintiffs in error herein for failure of said plaintiffs in error to perfect their appeal.

3. That no sufficient bond on writ of error was given by the plaintiffs in error at the time of the issuance of the summons in error herein, but that long subsequent to the issuance of said summons in error the bond now on file herein was given and allowed to be filed by the court below over the objections and exceptions of this defendant in error.

4. For the reason that no transcript of the record has been filed herein on or before the first day of this term; no abstract of the record has been filed or served, and no brief filed or served by the plaintiffs in error.

THOS. ARMSTRONG, JR.,
Attorney for James Wilson, Defendant in Error.

In the Supreme Court of the Territory of Arizona.

A. L. JOHNS ET AL., Appellants and Plaintiffs in Error,
vs.
JAMES WILSON, Appellee and Defendant in Error.

Reply to Motion to Dismiss. Filed January 17th, 1898.

Comes the plaintiff in error, and, for answer to defendant in error's motion to dismiss, answers as follows, to wit:

184 I.

Answering paragraph one of defendant in error's motion to dismiss, admits that an appeal was taken and perfected on the 9th day of April, 1897 (see folio 282 of succinct statement), (which is as follows, to wit: "Whereas in the above numbered and entitled cause pending in the district court of Maricopa county, and at a regular term of said court, to wit, on the 21 day of Dec., A. D. 1896, the said James Wilson recovered judgment against the said defendants, A. L. Johns, R. E. Daggs, W. A. Daggs, and A. J. Daggs, for the sum of $8,441.13, and for foreclosure of mortgage, with interest thereon from the 21 day of December, 1896, at 8 per cent. per annum, and all costs of suit, from which judgment the said A. L. Johns, R. E. Daggs, W. A. Daggs, and A. J. Daggs have taken an appeal to our supreme court, and desires to suspend the execution of said judgment during the pendancy of said appeal;" which paragraph of succinct statement is the same as will be found on page 142 of this record), as alleged by defendant in error, but denys that said appeal was ever abandoned, but alleges that on the 1st day of the term of this court the plaintiff in error filed all the original papers in the case in this court certified to by the clerk of the court below, and all abstracts of the record on the second day of this term of this court, to wit, on the 11th day of Jan., 1898, and duly served on the counsel two copies of said abstract, as required by law, all of which was well known to counsel at the time he made this motion to dismiss and affirm.

185 II.

Answering paragraph two, will say that we refer to above, which shows that the appeal was perfect, and as defendant in error confesses and declares to this court that the appeal was perfected and asks that the judgment be affirmed, we submit the above.

III.

Answering paragraph three of said motion, says that the bond in error is ample and sufficient in form and substance, as shown by the abstract, folio 299. (Abstract, folio 299, reads as follows, to wit:)

"Whereas in the above-numbered and entitled cause pending in the district court of Maricopa county, and at a regular term of said court, to wit, on the 21st day of December, A. D. 1896, the said James Wilson (pl't'f), defendant in error, recovered a judgment against R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns for the sum of $8,541.13, with interest on the sum of $6,500.00, at the rate of eight per cent. per annum from Dec. 21st, 1896, until paid, with interest on $2,041.13 from Dec. 21, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (pl't'f's) defendant in error's mortgage in the said action described as against all of the plaintiffs in error, and for costs of suit, taxed at $177.00, defendant in error also obtained upon May 25th, 1897, that being a regular law day of the May term of said court, an order

against the plaintiffs in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error—

From which judgment and order the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs have sued out a writ of error to our supreme court:

186 Now, therefore, we, A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, as principal-, and The London Company, as surety acknowledge ourselves bound to pay the said James Wilson the sum of $350.00, conditioned that the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, plaintiffs in error, will prosecute their writ of error with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 20th day of Dec., 1897.

A. L. JOHNS, by A. J. DAGGS, *His Att'y.*
W. A. DAGGS, " " " " "
A. J. DAGGS.
R. E. DAGGS.
THE LONDON CO., by R. E. DAGGS, *Sec't'y.*

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

R. E. Daggs, being duly sworn, says that he is the secretary of The London Company, a corporation organized and existing under the laws of the Territory of Arizona, and makes this affidavit for it on its behalf and in its stead; that said corporation has power and authority by its charter to execute the foregoing bond; that he knows of his own knowledge that said corporation is worth the amount for which it has become liable over and above its just debts and liabilities, exclusive of property exempt from execution.

R. E. DAGGS.

Subscribed and sworn to before me this 20th day of Dec., A. D. 1897.

IDA I. WOODWORTH,
Notary Public.

My commission expires Oct. 21, 1900."
Filed Dec. 20, 1897.

187 (Which bond in error is the same as will be found on pages 149, 150, and 151 in this record), and said bond was duly filed and approved by the clerk of said district court on the 20th day of Dec., 1897. Said judgment was rendered on Dec. 21, 1896; motion for a new trial was overruled on March the 20th, 1897.

On exception to said bond the court ordered plaintiff in error to file supplemental bond by the 8th day of Jan., 1898, which was presented on Jan. 8th, 1898, and duly approved by the court, which order is as follows, to wit:

"Jan. 8th, 1898.—Comes now the above-named defendants and present to the court their bond on writ of error herein, with new sureties, which, by order of the court heretofore made, said defend-

ants were granted leave to file at this time, and the court, having examined said bond and being satisfied with the sufficiency of the sureties thereon, approves said bond and orders that it be filed."

(See folio 328 of succinct statement,) which is as follows, to wit:

"*Supplemental Amended Bond on Error.*

Whereas in the above numbered and entitled cause pending in the district court of Maricopa county, and at a regular term of said court, to wit. on the 21st day of December, A. D. 1896, the said James Wilson (pl't'f), defendant in error, recovered a judgment against R. E. Daggs, A. J. Daggs, W. A. Daggs, and A. L. Johns for the sum of eight thousand five hundred and forty-one dollars and thirteen cents ($8,541.13), with interest on the sum of $6,500, at
the rate of eight per cent. per annum, from Dec. 21, 1896,
188 until paid, with interest on $2,041.13 from Dec. 21st, 1896, at the rate of seven per cent. per annum, until paid, together with the foreclosure of (pl't'f's) defendant's in error mortgage in the said action described as against all of the plaintiffs in error, and for the costs of suit, taxed at one hundred and seventeen dollars, defendant in error also obtained, upon May 25, 1897, that being a regular law day of the May term of said court, an order against the plaintiff in error disapproving the supersedeas bond filed in said action by the said A. J. Daggs, plaintiff in error—

From which judgment and order the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs have sued out a writ of error to our supreme court, and duly filed therein their cost bond in error on the 20th day of December, 1897, and the defendant in error having excepted to the same, and notice having been given to qualify the said bond before the court on the 31st day of December, and the court on said day having the plaintiff in error to file supplemental bond with additional sureties, and in compliance with said order this bond is made:

Now, therefore, we, A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, as principal-, and Wm. M. Billups and W. K. James, as sureties, acknowledge ourselves bound to pay the said James Wilson the sum of $350.00, conditioned that the said A. L. Johns, R. E. Daggs, A. J. Daggs, and W. A. Daggs, plaintiffs in error, will prosecute their writ of error with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 7th day of Jan., A. D. 1898.

189 A. L. JOHNS, by A. J. DAGGS, *His Att'y.*
W. A. DAGGS, " " " " " "
A. J. DAGGS.
R. E. DAGGS.
WM. M. BILLUPS.
W. K. JAMES.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Wm. M. Billups and W. K. James, sureties on the above and foregoing bond, being duly sworn each for himself and not one for the other, says that he is a resident and householder of the county of Maricopa, Territory of Arizona, and is worth the amount for which he has become liable as surety over and above all his just debts and liabilities, exclusive of property exempt from execution.

WM. M. BILLUPS.
W. K. JAMES.

Subscribed and sworn to this 7th day of Jan., 1898.

IDA I. WOODWORTH,
Notary Pub.

My commission expired Oct. 21, 1900.

Filed Jan. 8, 1898."

(Which supplemental amended bond on error is the same as may be found on pages 157, 158, and 159 of this record.)

This perfected both writ of error and appeal, and on both we stand; have filed our record proper and abstract in due time. The original papers in the case were filed Jan. 10th, 1898, that being the first day of this court; our abstract was not ready for the reason that we did not get the testimony until Dec. 31st, and we were also delayed for the reason that Exhibit A was misplaced
190 in the clerk's office and we could not get it to copy from, which made us one day late, or the 11th day of January, 1898, the second day of the term. We made our record abstract and filed it with all possible speed, and have a complete abstract of all the record which will dispense with the original papers altogether. We are now making our briefs with all speed, and will serve them as soon as possible.

Wherefore plaintiff in error and appellants pray that this motion to dismiss be overruled, as it seems to have been made to delay the case, and that the case stand for trial on the merits, as we have a meritorious defense, and that justice may be done.

A. J. DAGGS.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs and A. J. Daggs, being duly sworn each for himself and not one for the other, says that he has read the foregoing answer and knows the contents thereof, and knows the same to be true in substance and in fact.

R. E. DAGGS.
A. J. DAGGS.

Subscribed and sworn to before me this 15 day of Jan., A. D. 1898.

IDA I. WOODWORTH,
Notary Public.

[SEAL.]

My commission expires Oct. 21, 1900.

191 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiff- in Error,
vs.
JAMES WILSON, Defendant in Error.
} Minute Entry of Jan'y 12th, 1898.

On motion of Mr. A. J. Daggs, counsel for plaintiff- in error, it is ordered that plaintiff- in error have three days from this date in which to file answer to defendant in error's motion to dismiss the writ of error herein.

On motion of counsel for plaintiff- in error, it is further ordered by the court that the hearing of this cause be set for February 4th, 1898.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiff- in Error,
vs.
JAMES WILSON, Defendant in Error.
} Minute Entry of Jan'y 17th, 1898.

On motion of Thos. Armstrong, Jr., of counsel for defendant in error, ordered that defendant in error have leave to file brief by tomorrow.

192 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiff- in Error,
vs.
JAMES WILSON, Defendant in Error.
} Minute Entry of Jan'y 19th, 1898.

The motion of defendant in error to dismiss writ of error, filed herein, having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, denied.

On motion of counsel for plaintiff- in error, it is ordered that plaintiff- in error have seven days from this date in which to file brief, and defendant in error to file reply by February 2nd, 1898.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiff- in Error,
vs.
JAMES WILSON, Defendant in Error.
} Minute Entry of Feb'y 4th, 1898.

This cause, coming on for hearing, was argued by A. J. Daggs, attorney for plaintiff- in error, and by Mr. Thomas Armstrong for defendant in error, and the cause ordered submitted.

193 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiffs in Error, vs. JAMES WILSON, Defendant in Error. } Judgment. Rendered June 11th, 1898.

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment be modified by omitting therefrom the personal judgment against A. L. Johns for the amount of the mortgage debt as shown in folio 261, and omitting therefrom the reference to A. L. Johns in the direction to the sheriff, "That said sheriff make the balance due upon said judgment out of any other property of the said defendants, R. E. Daggs and A. L. Johns," as shown in folio 270 of the abstract of said judgment as filed herein.

The case is therefore remanded, and the district court is directed to modify the said judgment as indicated herein.

194 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, R. E. DAGGS, W. A. DAGGS, and A. J. Daggs, Plaintiffs in Error, vs. JAMES WILSON, Defendant in Error. } No. 621. Opinion. Rendered June 11th, 1898.

Appeal from the district court of Maricopa county, Hon. A. C. Baker, judge.

A. J. Daggs, attorney for plaintiffs in error.
Thos. Armstrong, Jr., attorney for defendant in error.

Opinion by Doan, Justice.

On the 24th day of April, 1893, one John S. Armstrong executed a mortgage on certain real estate to James Wilson to secure the payment of two notes therein described, each for $3,250 and interest. Afterwards, on the 18th day of December, 1893, the said Armstrong sold the premises thus mortgaged to one R. E. Daggs and conveyed the same by a deed of conveyance, in which the said defendant, R. E. Daggs, agreed and bound himself, his heirs, executors, and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the premises by one W. A. Daggs as his tenant.

On the 26th day of April, 1894, default having been made
195 in the payment of the notes thus secured by the mortgage referred to, the said Wilson commenced an action in the district court of Maricopa county against the said Armstrong and R. E. Daggs for the recovery of the amount due upon the notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder

of said county. At this time the defendant W. A. Daggs was in possession of the premises supposedly as the tenant of R. E. Daggs, in whom, so far as disclosed by the record, the title then appeared to be. After personal service upon defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the 8th day of May, 1894, against defendants J. S. Armstrong and R. E. Daggs for the full amount due, with costs, and for the foreclosure of the mortgage.

Thereafter, on the 6th day of June, 1894, the property was sold by the sheriff of Maricopa county under execution and order of sale issued upon the said judgment, and was bid in by the plaintiff for the full amount of his judgment.

Thereafter and on the 12th day of December, 1894, the sheriff of said county, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the purchaser under said sheriff's deed, the aforesaid W. A. Daggs was found in possession and refused to surrender the same, and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that
196 time to the present continued to hold and keep said premises and property as such tenant of A. L. Johns to the total exclusion of the plaintiff Wilson. The record further discloses that on the 28th day of April, 1894, after the summons had been served upon the said R. E. Daggs and the *lis pendens* had been filed in the action aforesaid, a deed had been placed on record transferring the property in question from R. E. Daggs to one A. L. Johns, of Chicago, and on the demand for possession as aforesaid it was claimed by the defendant W. A. Daggs that on the 1st day of April, 1894, he ceased to be the tenant of R. E. Daggs, and thereupon became the tenant of the said A. L. Johns, and took possession of said property for said Johns at that time, and held possession from that time forward as the tenant of the said A L. Johns and not as the tenant of the said R. E. Daggs.

Thereafter, on the 22nd day of June, 1895, the plaintiff James Wilson filed his complaint in the said court in the nature of a bill in equity setting up the facts aforesaid and alleging that at the time he commenced the action for the foreclosure of the mortgage the said J. S. Armstrong and R. E. Daggs were the only persons known to the plaintiff to be liable upon said notes or to have any interest whatever in said mortgaged property, and alleging that the said defendants, R. E. Daggs and A. J. Daggs, conspiring together to hinder and obstruct the plaintiff in the collection of his said mortgage debt, did procure the said deed of conveyance of said property from the said R. E. Daggs to the said A. L. Johns for the sole purpose of hindering, delaying, and obstructing him in the collection of the said mortgage debt; that said pretended deed of
197 conveyance, though dated on the 17th day of March, 1894, was withheld from record until the 28th day of April, 1894, after the summons in said action upon the defendants Armstrong

and R. E. Daggs had been served after the said *lis pendens* had been filed for such purpose of delaying and defrauding the said plaintiff; that in said deed to A. L. Johns aforesaid said A. L. Johns expressly agreed and bound himself to pay this plaintiff's mortgage debt as aforesaid; that the plaintiff was not advised by the said W. A. Daggs of his surrender of the premises as the tenant of R. E. Daggs or of the taking possession of the said premises by the said W. A. Daggs as the tenant of the said A. L. Johns, but that such abandonment and release of said property or such asserting and taking possession thereof, if done at all, was done secretly, without any notice whatever to the plaintiff herein, with intent to deceive this plaintiff into the belief that the said R. E. Daggs was the owner of the said premises and possessed thereof by the said W. A. Daggs as his tenant, and that the plaintiff, on account of said secret transfer of possession, if any was made, was so deceived as above alleged the defendant intended him to be, and that said action therefore proceeded to judgment without his joining or making the said A. L. Johns and W. A. Daggs defendants therein; that the plaintiff had no knowledge or information whatsoever when he commenced his said action and filed his said notice of *lis pendens* that any other person than the said R. E. Daggs and J. S. Armstrong had any claim whatsoever to said premises.

Plaintiff further set up the refusal of the said W. A. Daggs
198 to surrender the said property under the sheriff deed aforesaid, and his claims made on said property as the tenant of said A. L. Johns, the exclusion of the plaintiff therefrom, and alleged damages thereby in the sum of $1,000, and alleged that the real holding of the said W. A. Daggs was in trust for the benefit of the said R. E. Daggs by and through the acts, bargains, and contrivances of the said R. E. Daggs and the said A. J. Daggs, who was the agent and attorney of the said A. L. Johns; that the property consists of farming lands, buildings, and improvements, and that defendants have neglected and refused to pay the taxes or keep up repairs on the said property and have otherwise permitted waste thereon and threatened so to do; that said property was inadequate security for debt of plaintiff against the same; that the defendants who resided in this Territory and were liable to pay such mortgage debt were insolvent, and that all others who were liable to pay the same were beyond the jurisdiction of this court; that the plaintiff had no other security or means of collecting his said debt than through his lien upon said property, and was in danger, therefore, of losing the same or the larger part thereof. Wherefore plaintiff prayed that he might have judgment against said R. E. Daggs and A. L. Johns, who, as aforesaid, have assumed and agreed to pay such mortgage debt for the sum of $6,500, with interest thereon from the date of said note, with attorney's fees and costs of suit, and for the sum of $1,000 as damages by reason of the premises stated, as aforesaid, and that the plaintiff's mortgage be adjudged
to be wholly unpaid and unsatisfied, and that the same be
199 foreclosed against said defendants and all of them and all persons holding under them, and for such other and further

relief as the circumstances of the case require and justice and equity demand.

To this action the defendants answered separately, each by demurrer and answer, on different grounds. After such demurrers were overruled application was made for change of venue by two of the defendants, which application was denied, and the case was, on December 21st, tried before the court without a jury and judgment was rendered in favor of the plaintiff for the amount of the debt and decree of foreclosure upon the premises granted. The deed dated 17th of March, 1894, from Daggs to Johns was decreed to be fraudulent and void, and a personal judgment was rendered against R. E. Daggs and A. L. Johns for the balance due on said judgment, to be made out of any other property of said R. E. Daggs and A. L. Johns as under ordinary execution. Defendant appealed and thereafter sued out a writ of error and brings this case here for review.

The errors assigned are numerous; but as many of them are upon immaterial points and some are without merit, it will only be necessary to consider those that go to the vital issues in the case. The first material proposition that is alleged is in support of the demurrers of the several defendants, on the ground that the grantees of the original mortgagor were not liable to a direct action by the mortgagee because no privity of contract was shown in the pleadings to exist between said grantees and the mortgagee, and the action was not brought in the name of or for the benefit of the mortgagor.

200 This is a mere matter of procedure and is governed by the *lex fori*. In those jurisdictions where the common-law practice is yet observed one course is followed, while another rule obtains in those jurisdictions where the code practice has been adopted. The rule under the one procedure is very concisely stated by Mr. Justice Gray, in the case of Willard *vs.* Wood, 135 U. S., 309, in the following language: "The only remedy of the mortgagee against the grantee was as adjudged upon great consideration in Keller *vs.* Ashford, 133 U. S., 610, by bill in equity, in which he might avail himself of the right of the mortgagor against his grantee, because in equity a grantor is entitled to avail himself of the security which his debtor holds from a third person for the payment of the debt. In the supreme court of the District of Columbia, as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law."

Under our code practice, however, where our courts exercise a common jurisdiction, without any distinction between suits at law and in equity, the procedure adopted in this case is distinctly authorized. The rule is very plainly stated and the reasons supporting it given in Williams *vs.* Naftzger, 37 Pac., 411: "An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee; and in an action for the foreclosure of the mortgage, if the mortgaged premises are in-

sufficient to satisfy the mortgage debt, judgment may be ren-
201 dered against him, as well as against the mortgagor, for the amount of such deficiency.

This liability results from the familiar doctrine in equity that the grantor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt.

By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety."

The next assignment of error is based upon the proposition that the former judgment is conclusive against the parties to the action, and the plaintiff in this case has already had one judgment and cannot bring a second action.

This suit is brought for the purpose of foreclosing the mortgage against one who was not a party to the former suit, and whose nonjoinder as a party in a former suit is explained in the pleadings herein by the ignorance of the plaintiff of the said defendants' interest in the suit or title to the property, and that ignorance is further explained by the allegation in the pleading that upon the conspiracy and contrivance of the said defendant and other defendants who are joined with him all the interest of the said defendant in the suit and the claim of title to the premises on the part of the said defendant was purposely and fraudulently withheld from the knowledge of the plaintiff, and such fraudulent concealment
202 of fact on the part of the defendants accounted for the nonjoinder in the former suit of such defendant by the plaintiff herein.

The right to a second or supplemental foreclosure of the interest of a party whose title to the premises is discovered after the former action, without negligence or the want of due diligence on the part of the plaintiff in the former action, is fully sustained by our courts.

Morey *v.* City of Duluth, 71 N. W., 694.
Brackett *v.* Barnegas, 48 Pac., 90.

The next assignment of error is based upon the proposition that because the plaintiff has made a mistake of law the court has no jurisdiction to grant relief. The authorities quoted fully sustain the doctrine laid down by Justice Story that "a naked mistake of law, unattended with any special circumstances, such as misplaced confidence, misrepresentation, or undue influence, will furnish no ground for the interposition of a court of equity, and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions."

This doctrine, however, refers to cases where a mistake of law has occurred, where the facts are known, and no fraud or deceit has been practiced, whereas in this instance the relief is asked on the ground of mistake in fact as well as law, and for which mistake the

fraud and deceit of the defendants are alleged in the pleadings to be responsible.

In the case at bar, if any mistake of law was made, it was certainly induced by the fraudulent withholding from the record of the
203 deed from Daggs to Johns until after the records were searched, the foreclosure suit begun, and the *lis pendens* had been filed.

The next and last assignment of error worthy of our attention is that the court rendered a personal judgment against the defendant A. L. Johns for the full amount of the debt sued on by reason of his liability under the terms of his deed from R. E. Daggs, after having adjudged and decreed the said deed to be fraudulent and void, and after having for that reason set the same aside. An examination of the record discloses the fact that in folios 264–'5 the judgment declares: "It is hereby ordered, adjudged, and decreed that that certain deed of conveyance of said premises executed by the defendant R. E. Daggs to the defendant A. L. Johns, dated the 17th of March, 1894, and recorded on the 28th day of April, 1894, is fraudulent and void as against this plaintiff and as against the aforesaid mortgage of this plaintiff."

Presuming that the decree declaring the deed void is correct, and that the evidence fully sustains it, the correctness and validity of this decree in the judgment would render it error for the court to render a personal judgment against the said defendant, A. L. Johns.

If the deed mentioned had been considered valid and Johns had been made a party defendant in the action, as prayed in the complaint, and his title thus extinguished under the foreclosure, the personal judgment against Johns for any deficiency that might remain would have been proper; but if the decree adjudging the deed fraudulent and void is correct, then it would naturally follow
204 that that deed could neither convey to Johns title to the property nor could a stipulation in a void deed make Johns personally liable for a debt that was a debt against the property to which such void deed failed to convey title, and the validity of the decree, as rendered in folios 264–'5, setting aside the deed as fraudulent and void, renders erroneous the decree granting a personal judgment for the mortgage debt against Johns as the grantee in such void deed, as given in folio 261, and the reference to Johns in the direction to the sheriff, "that said sheriff make the balance due upon said judgment out of any other property of said defendant, R. E. Daggs and A. L. Johns, as on ordinary execution," as shown in folio 270.

It is, therefore, ordered that the judgment be modified by omitting therefrom the personal judgment against A. L. Johns for the amount of the mortgage debt, as shown in folio 261, and omitting therefrom the reference to A. L. Johns in the direction to the sheriff "that said sheriff make the balance due upon said judgment out of any other property of the said defendants, R. E. Daggs and A. L. Johns," as shown in folio 270 of the abstract of said judgment

as filed herein. The case is therefore remanded, and the district court is directed to modify the said judgment as indicated herein.

FLETCHER M. DOAN,
Associate Justice.

WEBSTER STREET,
Chief Justice.
RICHARD E. SLOAN,
Associate Justice.
GEO. R. DAVIS,
Associate Justice.

205 In the Supreme Court of the Territory of Arizona, Jan. Term, 1898.

JAMES WILSON, Defendant in Error,
vs.
A. L. JOHNS ET AL., Plaintiff- in Error.
} Petition for Rehearing. Filed June 25th, 1898.

Comes A. L. Johns, R. E., A. J., and W. A. Daggs and moves the court for a rehearing and review of the judgment herein rendered on the 11th day of June, 1898, and for cause alleges:

1st.

Because the court erred in ignoring the assignment of error No. 1 and in rendering judgment against defendants and each of them, being the demurrer of defendant A. J. Daggs, on the grounds that "the plaintiff's petition does not state facts sufficient to constitute a cause of action."

2nd.

Because the court erred in ignoring the assignment of error No. II. and in rendering judgment against defendants and each of them, which assignment is as follows: "The court erred in overruling the general demurrer of W. A. Daggs."

3rd.

Because the court erred in ignoring the assignment of error No. 3 and in rendering judgment against defendants and each of them, which assignment is as follows: "The court erred in overruling the special demurrer of A. L. Johns;" which demurrer is as follows:

206 "*Separate Demurrer and Answer of A. L. Johns.*"

"Come- defendant A. L. Johns and for separate answer to plaintiff's complaint demurs and for ground of such special demurrer alleges:

I.

That plaintiff is not entitled to recover in this action in his own right.

II.

That plaintiff is not suing in the right of the mortgagor.

III.

That plaintiff's petition shows no privity of contract between plaintiff and defendants.

IV.

That no reason is shown why plaintiff's first and former judgment is not sufficient.

V.

That no reason is shown why W. A. Daggs and A. L. Johns *was* not made parties to the original action.

VI.

That no reason is shown for not applying for relief in the former foreclosure suit.

VII.

That no reason is shown for a second decree, no reason being shown why he, plaintiff, could not collect his debt by execution on his former judgment against the mortgagor.

VIII.

That the mortgagor is not before the court.

IX.

That no separate action can be maintained on a mortgage
207 and debt, it being shown to have been once merged in a judgment.

X.

That the plaintiff has joined in his petition causes of action *ex contracto* with cause- of action *ex delicto*.

XI.

That plaintiff has misjoined parties defendant.

XII.

That plaintiff's petition shows that he already has a judgment against defendant R. E. Daggs for the same debt and mortgage that forms one of the foundations of this action.

XIII.

That plaintiff has made a mistake of the law and this court is without jurisdiction to grant relief.

XIV.

Wherefore def't prays judgment that plaintiff take nothing by this action; that *this* go hence without day and recover his costs herein expended.

A. L. JOHNS, *By Att'y.*"

4.

Because the court erred in ignoring the assignment of error No. 4 and in rendering judgment against defendants and each of them; which assignment is as follows: "The court erred in overruling the special demurrer of R. E. Daggs, based on the following grounds:

"*Separate Demurrer and Answer of R. E. Daggs.*

Comes defendant R. E. Daggs and for separate answer to plaintiff's complaint demurs, and for grounds of such special demur alleges:

208 I.

That plaintiff is not entitled to recover in this action in his own right.

II.

That plaintiff is not suing in the right of the mortgagor.

III.

That plaintiff's petition shows no privity of contract between plaintiff and defendants.

IV.

That no reason is shown why plaintiff's first and former judgment is not sufficient.

V.

That no reason is shown why W. A. Daggs and A. L. Johns *was* not made parties to the original action.

VI.

That no reason is shown for not applying for relief in the former foreclosure suit.

VII.

That no reason is shown for a second decree, no reason being shown why plaintiff could not collect his debt by execution on his former judgment against the mortgagor.

VIII.

That the mortgagor is not before the court.

IX.

That no separate action can be maintained on a mortgage and debt, it being shown to have once merged in a judgment.

X.

That plaintiff has joined in his petition causes of action
209 *ex contracto* with causes of action *ex delicto*.

XI.

That plaintiff has misjoined parties defendant.

XII.

That plaintiff's petition shows that he already has a judgment against defendant R. E. Daggs for the same debt and mortgage that forms one of the foundations of this action.

XIII.

That plaintiff has made a mistake of law, and this court is without jurisdiction to grant relief.

XIV.

Wherefore defendant prays judgment that plaintiff take nothing by his action; that defendant go hence and recover his costs herein expended.

R. E. DAGGS."

5.

Because the court erred in ignoring assignment of error No. 5, and in rendering judgment against defendants and each of them; which assignment is as follows:

V.

"The court erred in overruling the motion for a change of venue."

6.

Because the court erred in ignoring the assignment of error No. 6, and in rendering judgment against defendants and each of them; which assignment is as follows:

"VI.

"The court erred in overruling the motion of defendants
210 for a continuance of defendants."

7.

Because the court erred in ignoring assignment of error No. 9, and in rendering judgment against defendants and each of them which assignment is as follows:

"IX.

The court erred in admitting in evidence the deposition of A. L. Johns."

Because the court erred in ignoring assignment of error No. 10, and in rendering judgment against defendants and each of them; which assignment is as follows:

"X.

The court erred in permitting the plaintiff to introduce testimony to show when the London Company was organized, as to whom it was organized by, and as to what the London Company paid for the land in question, as to how it paid, and as to what property the London Company had, all over the objections and the exceptions of the defendants."

8.

Because the court erred in ignoring assignments of error Nos. 11, 12, 13, 14, 15, 16, and each of them, and in rendering judgment against the defendants and each of th -hich assignments are as follows:

"XI.

The court erred in permitting the plaintiff to prove what consideration R. E. Daggs received from A. L. Johns for the land in question, and to trace the transaction out as to where he received
211 and what he received it in and what he did with the consideration.

XII.

The court erred in admitting the record in case No. 1954 and marked Exhibit A and the papers therein.

XIII.

The court erred in overruling the defendants' motion to arrest and vacate the judgment and for a rehearing of the cause.

XIV.

The court erred in overruling defendants' motion for judgment and rendering judgment against the defendants and each of them.

XV.

The judgment (folio 258, abstract; page 101 this record) is void for the following reasons:

1st. Because no summons was served on John S. Armstrong, against whom the judgment was rendered.

2nd. Because the deed of Johns was set aside as fraudulent and void and a judgment rendered at the same time against Johns on the same deed.

XIV.

The judgment is erroneous for the reasons following, to wit:

1st. Because said judgment attempts to revive a dead judgment against persons not parties thereto and carry its effect over to parties on whom there was no service and no day in court and long after the term and long after the same was of record satisfied and discharged.

2nd. Because the judgment purports to adjudge that the notice of *lis pendens* filed in case No. 1954 was notice to A. L. Johns and
212 all defendants.

3rd. Because the judgment purports to order a sale of the land in case No. 1954—a case that none of the defendants in this case were party to.

4th. Because the case is founded on the judgment in case No. 1954, and the judgment shows that none of the parties in this action are liable on that judgment.

5th. Because the judgment purports to allow the plaintiff to apply for a receiver at any time.

6th. Because the evidence introduced by the plaintiff, being Exhibit A, shows that the sheriff sold the land at public sale and received the cash and paid it to the plaintiff.

7th. Because the judgment sets the sale and satisfaction and deed aside, purports to reinstate the supposed dormant, satisfied, and dead judgment.

8th. The judgment is void for the reason that the second judgment is a nullity founded on a judgment, the cause of action never having been reinstated."

9.

Because the court erred in assuming that the allegations of plaintiff's petition were sufficient, and in assuming that the allegations of said bill were true, when the bill was not sufficient and there was no evidence to sustain it and defendants' answer specifically denies it.

10.

Because the court assumes that the judgment of the lower court was correct, and assuming that the evidence sustained it,
213 when there was no proof to show any fraud or any liability on the part of defendants or either of them.

11.

Because the court erred in assuming that fraud existed, and in setting aside the deed of Johns, when no fraud had been proven and none existed.

12.

Defendants further show that the attorney of record of James Wilson is Thos. Armstrong, Jr., who resides in Phœnix, Maricopa county, Arizona.

Wherefore defendants pray that they be granted a rehearing of said case, and that upon said hearing that the judgment of this court and of the court below be set aside and vacated and held for naught, and that justice may be done in the premises.

A. J. DAGGS,
Attorney for Defendants.

In the Supreme Court of the Territory of Arizona.

A. L. JOHNS ET AL., Plaintiffs in Error, *vs.* JAMES WILSON, Defendant in Error. } No. 621. January Term, 1898. Filed June 29th, 1898.

Precept.

The Territory of Arizona to the constable of Maricopa county, Greeting:

214 Whereas, on an appeal in the above-entitled cause by the appellant herein, the supreme court of the Territory of Arizona did on the 11th day of June, 1898, render judgment in said cause modifying the judgment of the court below; and whereas the above-named plaintiff in error did on the 25th day of June, 1898, and within fifteen days after the rendition of said judgment by said supreme court, file in the office of the clerk of said court its certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept:

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to Thomas Armstrong, Jr., attorney of record for defendant in error, whose residence and place of business is Phœnix, Arizona, and that you make the return of this precept, with your proceedings thereunder entered thereon, to this court forthwith.

Witness the Honorable Webster Street, chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

Done at Phœnix, the capital of Arizona, this 29th day of June, 1898.

[SU. CT. SEAL.] LLOYD JOHNSTON,
Clerk of the Supreme Court of Arizona.

JUNE 29, 1898.

I, John Beck, constable of Phœnix precinct, Maricopa Co., Arizona, do hereby certify that I served the within-named motion for rehearing, by delivering the within-named certified copy of said motion to Thos. Armstrong, Jr., in person, in Phœnix, Arizona, on the 29th day of June, 1898.

JOHN BECK,
By JOE M. BALSZ, *Dep-ty.*

215 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, R. E. DAGGS, ET AL., Plaintiffs in Error, *vs.* JAMES WILSON, Defendant in Error. } Minute Entry, October 1st, 1898.

In this cause it is ordered that the motion for rehearing filed herein by plaintiff in error be, and the same is hereby, denied.

A. L. JOHNS, R. E. DAGGS, A. J. DAGGS, and W. A. Daggs, Plaintiffs in Error. *vs.* JAMES WILSON, Defendant in Error. } Minute Entry, October 1st, 1898. Notice of and Granting Appeal.

In this cause Mr. A. J. Daggs, attorney for plaintiffs in error, in open court, gave notice of appeal from the judgment of this court to the Supreme Court of the United States, and moved the court that it fix the amount of the cost bond on appeal herein in the sum of one thousand dollars, and that the clerk of this court is hereby requested to retain the papers in said cause in his custody for twenty days; whereupon it was so ordered and the appeal allowed.

216 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS ET AL., Appellants. *vs.* JAMES WILSON, Appellee. } Notice of Appeal and Motion to Find Facts. Filed October 1st, 1898.

Come all the appellants in this case in open court and give notice of appeal to the Supreme Court of the United States, and pray that their appeal be allowed, and ask that a bond for costs be fixed by this court, to be approved by this court or a justice thereof.

And that an order be made of record that the record papers in this case be retained in this court until this appeal can be perfected.

Appellants further ask that this court make a finding of fact in this case, in the nature of a special verdict, and file it with the clerk of this court as of the date of the rendition of the judgment herein, according to sec. 1868 of the organic act of Arizona Territory.

A. J. DAGGS,
Attorney for All the Appellants.

217 In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants,
vs.
JAMES WILSON, Appellee.

Affidavit of Value. Filed December 5th, 1898.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

A. J. Daggs, being duly sworn, deposes and says that he is fully acquainted with the amount in dispute and the value of the land whose title is in question; that the value of the land described by the plaintiff in his complaint, the title to which in favor — A. L. Johns was set aside, is of the reasonable value of twelve thousand dollars.

A. J. DAGGS.

Subscribed and sworn to before me this 1st day of October, A. D. 1898.

[NOTARY SEAL.]

R. E. DAGGS,
Notary Public.

My commission expires April 8th, 1902.

218 In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants,
vs.
JAMES WILSON, Appellee.

Cost Bond in Appeal. Filed December 5th, 1898.

Know all men by these presents that we, A. L. Johns, W. A. Daggs, R. E. Daggs, A. J. Daggs, as principals, and Wm. M. Billups, as surety, are held and firmly bound unto James Wilson in the full and just sum of one thousand dollars, to be paid to the said James Wilson, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the supreme court of Arizona Territory, in a suit pending in said court between A. J. Daggs, A. L. Johns, W. A. Daggs, and R. E. Daggs and James Wilson, a final decree was rendered against the said A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs, and the said A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs having obtained an allowance of appeal and filed a copy thereof in the clerk's office of said court to reverse the said decree in the aforesaid suit, and a citation directed to the said James Wilson, citing and admonishing him to
219 be and appear at a Supreme Court of the United States, to be holden at Washington, on the 28th day of November, A. D. 1898:

Now, the condition of the above obligation is such that if the said A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs shall prosecute said allowance of appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. L. JOHNS, [SEAL.]
By A. J. DAGGS, *His Attorney.*
W. A. DAGGS. [SEAL.]
R. E. DAGGS. [SEAL.]
A. J. DAGGS. [SEAL.]
WM. M. BILLUPS. [SEAL.]

Sealed and delivered in the presence of—
——— ———.

Approved by me Oct. 1st, 1898.

RICHARD E. SLOAN,
Justice of the Supreme Court of Arizona.

220 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants, *vs.* JAMES WILSON, Appellees. } Notice. Filed March 16th, 1899. Lloyd Johnston, Clerk.

To James Wilson and Thomas Armstrong, Jr., his attorney of record:

Take notice that above-named appellants will present the original "Statement of facts," as prepared by the court, and the original "Objections and exceptions to admissions and rejection of evidence," as shown by the record, a copy of which is herewith served on you, to the court in this cause on March 13th, A. D. 1899, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, and will there move the court to sign and certify same and for order allowing same to be filed, *nunc pro tunc*, as of date Oct. 1st, A. D. 1898, the date of the allowance of this appeal, and that appellants be allowed to file their assignment of error, *nunc pro tunc*, as of same date.

A. J. DAGGS,
Attorney for Appellants.

Received service — within notice this 9th day of March, A. D. 1899.

THOS. ARMSTRONG, JR.,
Att'y for Appellee.

221 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants,
vs.
JAMES WILSON, Appellee.

Motion. Filed March 16th, 1899. Lloyd Johnston, Clerk.

Comes all the appellants, by their attorney, A. J. Daggs, and moves the court to sign and certify the "Statement of facts" and "Objections and exceptions to admission and rejection of evidence" in this cause, as prepared by the court and shown by the record, and order the same to be filed by the clerk of this court, *nunc pro tunc*, as of date Oct. 1st, A. D. 1898, the day of the allowance by this court of the appeal to the Supreme Court of the United States in this cause, and that appellants may be allowed to file their assignments of error, *nunc pro tunc*, as of the same date.

A. J. DAGGS,
Attorney for Appellants.

Received service of within motion this 9th day of March, A. D. 1899.

THOS. ARMSTRONG, JR.,
Att'y for Appellee.

222 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS ET AL., Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

No. 621. Minute Entry of March 16th, 1899.

In this cause it is ordered that the motion to file papers, *nunc pro tunc*, as of October 1st, 1898, be, and the same is hereby, granted.

A. L. JOHNS ET AL., Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

No. 621. Minute Entry of March 16th, 1899.

There coming on to be settled the "Statement of facts" heretofore presented to the court on the first day of October, 1898, and also "Objections and exceptions to admissions and rejection of evidence," *and* the same were signed by the court in open session and ordered filed as of the day presented, to wit, October 1st, 1898.

223 In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

Assignments of Error. Filed March 17th, 1899. Lloyd Johnston, Clerk.

October term, in the year of our Lord 1899.

Afterward, to wit, on the — day of October, in this same term, before the justices of the Supreme Court of the United States, at the

Capitol, in the city of Washington, comes the said A. L. Johns and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1.

In the action of the trial court in overruling the special demurrer of A. L. Johns for each of the following reasons, to wit:

1st. That no reason is shown why W. A. Daggs and A. L. Johns *was* not made parties to the original action.

2nd. That no reason is shown for not applying for relief in the former foreclosure suit.

3rd. That no reason is shown for a second decree, no reason being shown why the plaintiff could collect his debt by execution on his former judgment against the mortgagor.

4th. That no separate action can be maintained on a mortgage and debt, it being shown to have once merged in the judgment.

5th. That the plaintiff has joined in his petition causes of
224 action *ex contracto* with causes of action *ex delicto*.

6th. That plaintiff has misjoined parties defendant.

7th. That plaintiff has made a mistake of law and this court is without jurisdiction to grant relief.

2nd.

There is error also in this, to wit, in the action of the trial court in overruling the motion of A. L. Johns for change of venue on the grounds that the trial judge was so prejudice against the defendants that they could not have fair and impartial trial.

3rd.

There is also error in this, to wit, in the action of the trial *in* court in overruling the motion of A. L. Johns for a continuance of this cause on the grounds of the absence of material witness, John S. Armstrong, the mortgagor, who would testify that the defendant sued on in this case had been fully paid and discharged by him.

4th.

There is also error in this, to wit, in the action of the trial court in overruling the motion of A. L. Johns for judgment on the grounds and each of them that "the evidence introduced by the plaintiff is not sufficient to warrant the relief prayed for," and on the grounds that "there is no evidence to sustain the allegations of the complaint."

5th.

There is also error in this, to wit, in the action of the supreme court of Arizona in affirming the judgment of the trial
225 court, because said judgment is void for the following reasons:

1st. Because no summons was served on John S. Armstrong, against whom the judgment was rendered.

6th.

There is error in this, to wit, in the action of the district court in its ruling on the admission of evidence and admitting incompetent, irrelevant, and immaterial evidence over the objection of A. L. Johns.

Said evidence is as follows, to wit:

Q. After the sheriff's sale and the delivery of the deed upon sale under the execution in case of Wilson against Armstrong and R. E. Daggs, state whether or not you took the sheriff's deed and went down *the* the lands in question in this case.

Defendant objects to the question as incompetent, immaterial, and irrelevant, and for the further reason that it is not yet shown that any such case exists.

Objection overruled, and defendant excepts to the ruling of the court.

WITNESS: I don't remember whether I took the deed that the sheriff gave to this land in question or not when I went and demanded possession of the property, but as soon as the deed was delivered to me I had it recorded, and it was subsequent to that time that I made demand for the possession of the property. I found W. A. Daggs in possession. I did not obtain possession of the property. W. A. Daggs said he would not give possession of the property then, but he would consider later and let me know,
226 but he subsequently said that he refused to give it up.

Defendant moved to strike out the answer because it was not in the presence of defendant Johns. Objection overruled, and defendant excepts.

Q. Yes; it was for the purpose of getting possession, was it not?
WITNESS: Yes, sir; I saw Mr. Daggs there and Mrs. Daggs.
Q. You asked possession of them and was refused?
A. Yes, sir.

(Defendant object- and move- to strike out answer.)
(Motion is denied and defendants except-.)
Witness excused.

PLAINTIFF'S EXHIBIT C.

Deposition of A. L. Johns.

Interrogatory 1st. Where do you reside and what is your name, age, and occupation?

Answer. Chicago, Cook county; I am A. L. Johns; live-stock commission and real estate; 33 years.

Interrogatory 2nd. Are you one of the defendants in the above-entitled case?

Answer. I am.

Interrogatory 3rd. Are you acquainted with the plaintiff in the above-entitled cause?

Answer. With A. J. Daggs only.

Interrogatory 5th. During the month of March, 1894, did
227 you or did you not purchase one hundred acres, more or less, of the northwest one-fourth (N.W. ¼) of section nineteen (19), township one (1) south of range five (5) east of Gila and Salt River base and meridian, in Maricopa county, Arizona Territory?

Answer. I did.

Interrogatory 6th. If you state in your answer to interrogatory 5th that you did purchase the land described in said interrogatory, state from whom you purchased and what you paid therefor.

Answer. I purchased from Robert E. Daggs, through his agent, A. J. Daggs, and paid the sum of two thousand four hundred and fifty ($2,450.00) for the land described and the water rights connected therewith.

Interrogatory 7th. If you state in your answer to interrogatory 5 that you purchased the land mentioned therein, state whether or not you have paid the purchase-money in full.

Answer. I have paid the money in full for land and water, and hold receipts in full for the same.

Interrogatory 8th. If you state in your answer to interrogatory 7th that you paid the purchase-money, state when you paid it.

Answer. I paid the purchase-money when I received the warranty deed of the land—March 17, 1894.

Interrogatory 9th. If you state in answer to the above interrogatory that you purchased said land, state whether abstracts were furnished you and whether or not you had the abstracts, if one was furnished you, passed upon by an attorney or abstractor.

228 Answer. Yes; abstracts were furnished me and I had them passed upon by an attorney.

Interrogatory 10th. Did you ever have, previous to the bringing of this suit, any information to the effect that the purchase-money for the above-described land had never been paid the *the* plaintiff in this action?

Answer. No, sir; I never had any information to that effect whatever until I received through the mail a copy of petition purporting to bring suit for the purchase price of said lands, some time about the first of June.

Interrogatory 11th. Do you now own the above-described lands?

Answer. I do not.

Interrogatory 12th. If in answer to interrogatory 11th you answer that you do not own the land, you may state what you have done with the same.

Answer. I have sold the above-described land to A. J. Daggs, Scotland county, Missouri, for the price and consideration of twenty-six hundred dollars ($2,600), which sum I have received in full cash.

Interrogatory 13th. If in any answer to interrogatory 12th you answer that you have sold the land, state to whom you have sold it, at what price, and whether or not the purchase price has been fully paid.

Answer. As I stated in previous answer, I have sold the above lands, got my pay in full, and received payments in cash.

229 Interrogatory 14th. State any facts within your knowledge which may be material to either plaintiff or defendants in the above-entitled action.

Answer. I have stated all the facts relating to the purchasing and selling of this land.

Cross-interrogatories.

Interrogatory 1st. What relation are you by blood or marriage to the Daggs, who are defendants?

Answer. None at all.

Interrogatory 2nd. How long have — know- the Daggs?

A. I have know- A. J. Daggs since February or March, 1894.

Interrogatory 3rd. Where you ever at Tempe, in this county and Territory?

A. I was.

Interrogatory 4th. What is your business or occupation?

Answer. Live-stock commission and real estate.

Interrogatory 5th. State fully how you came to purchase the land described in the direct interrogatories; state fully.

A. I am subject to rheumatism in Chicago climate. I decided to change climate and pass the winters in warmer country, and being acquainted with the climate of the western portion of the United States I advertised in the Chicago Drivers' Journal for lands in the Southwest, New Mexico or Arizona preferred, thinking to engage in the winter season in the maturing and fattening stock and hold them on alfalfa for the high spring markets

230 in Chicago, and on shipment in the spring return to my business here. I received numerous letters from southern districts, together with a personal letter from A. J. Daggs representing himself as the agent of R. E. Daggs. He stated he had seen my advertisement in the Chicago Drivers' Journal and had called upon me for the purpose of offering some land in the South River valley, Maricopa county, Arizona Territory. He showed me maps of that country, and after some considerable examination and talk I concluded and so informed Mr. Daggs that I would purchase his hundred-acre tract and a tract adjoining Tempe known as Wilson tract, as the hundred-acre tract in section 19 above described was under the Tempe canal; that I was acquainted with this canal and knew it to be one of the oldest and best canals in the valley; provided he would furnish me abstracts of title showing the land to be clear and unincumbered. The abstracts Mr. Daggs furnished as requested. I submitted them to my attorney and instructed him to examine them carefully and report to me his conclusion. In a day or two my attorney brought the abstract to my office, and informed me as far as he could ascertain from the abstracts that the land in question was free and unincumbered. I thereupon saw Mr. Daggs and informed him that his money was ready for his one-hundred-acre tract and the water rights connected therewith in the Tempe canal whenever he delivered me a warranty deed for both

land and water. He produced the deed on or about the 17th day of March, A. D. 1894, and I paid him two thousand five hundred
231 and fifty dollars ($2,550.00) in cash, the price agreed, and took his deeds, also his receipt for money in full.

Interrogatory 6th. If you have answered that you have purchased and paid for the aforesaid lands, state fully when you paid the same, who you paid, where you paid, and how payment was made, if in cash or by drafts. Answer fully.

Answer. I paid for land and water rights at the time deed was delivered to me, on the 17th of March, 1894. A. J. Daggs, as agent for Robert E. Daggs, called at my office, in Chicago, Cook county, Illinois—in cash—and received receipt in full.

A. L. JOHNS.

Subscribed and sworn to before me this 6th day of October, A. D. 1894.

SIMEON W. KING,
Commissioner for Arizona at Chicago, Illinois.

Defendants object to the introduction of the same because defendants have no notice about the production of this instrument.

Defendant R. E. Daggs objects to the same as incompetent, immaterial, and irrelevant.

Objection overruled and exception taken. Same admitted as Plaintiff's Exhibit C.

V.

The London Company is a corporation here in this Territory, an Arizona corporation.

Q. When was it organized?

A. I- has been in existence for two years or more.

Defendants object to that, as it has no relevancy to the
232 issues in this case.

By the COURT: Is there any *lis pendens* on file?

By Mr. ARMSTRONG: Yes; in the original case at that time.

Objection is overruled. Defendants except.

A. I cannot tell without referring to the records when the London Company was incorporated.

A. It is incorporated in this county?

A. Yes, sir.

Defendant- objects to the question as incompetent and immaterial. Objection overruled, and defendants excepts.

Q. What other property had the London Company at the time it transferred its stock of $10,000 to A. L. Johns?

Defendants object to any testimony relative to the London Company for the reason that it is not a party to this action; it is incompetent, immaterial, and irrelevant. Objection overruled by the court, and defendant- excepts.

A. It has about 320 acres of alfalfa land in this valley and 600 acres in Coconino county, in this Territory, and a contract and a guarantee for sufficient money to buy 500 head cows and $50,000. I think that this land—320 and 600 acres—was free from incumbrance. I do not know.

The deed will show why the deed from the London Company to A. L. Johns was given. The deed will show how long before it was recorded it was dated; he attended to it. I think the president recorded it. I think I have seen the deed. I will
233 state for your information that I did not have anything to do with the transaction, but the president made the purchase.

Q. What consideration did you receive from A. L. Johns for this land on March 17th, 1894?

Defendants object to the question because it has no reference to the issues in this case. Objection overruled, and defendant excepts.

A. The expressed consideration was $11,500. I received $11,500. I got cattle and other property in the valley, and this was figured in the $11,500, and it was pertaining to this trade. There was a lot of notes and accounts. There was some grain and other property, some live stock.

VI.

PLAINTIFF'S EXHIBIT B.

Warranty Deed.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Know all men by these presents, that I, R. E. Daggs of the city of Chicago, county of Cook, State of Illinois, for and in consideration of eleven thousand five hundred dollars ($11,500.00) to me in hand paid by A. L. Johns of Chicago, county of Cook, State of Illinois, have guaranteed, sold and conveyed unto the said A. L. Johns all that certain premises described as follows, viz:

(Here follows a description same as set out in certified evidence.)

That said A. L. Johns buys the herein-described lands with
234 full knowledge of the now existing James Wilson and Desda Wilson mortgage of six thousand five hundred dollars and hereby assumes and agrees to pay the same.

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging to the said A. L. Johns, heirs and assigns forever. And I hereby bind myself, my heirs and executors and administrators to warrant and ever defend all and singular the premises unto the said A. L. Johns except the Wilson mortgage mentioned herein, heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof. And the parties herein further agree that this contract is made under the statute of

Arizona Territory now in force and that said statutes shall govern the construction of this deed.

Witness my hand this seventeenth day of March, 1894.

R. E. DAGGS. [SEAL.]

Filed and recorded at the request of Bank of Tempe, April 28th, 1894, at 8.30 a. m., Book 36 of Deeds, pages 110, 111, 112.

NERI OSBORN,
County Recorder,
By H. C. MEADOR, *Deputy.*

Plaintiff offers the same in evidence; asks to have same identified as Exhibit B in place of original deed, which is commanded and refused. Defendant objects to the introduction of the same.

Mr. ARMSTRONG: We will ask to have the reporter copy this into the record hereafter.

By R. E. DAGGS: We object to the introduction of the deed because it is not an instrument purporting to have any bearing
235 of the issues in this case, and it is immaterial, incompetent, and irrelevant.

Objection overruled, and defendant excepts.

Defendants, by A. J. Daggs, makes the same objection. Same ruling by the court and exception taken.

7th.

In the action of the supreme court of Arizona in affirming the judgment of the trial court in its judgment setting aside the deed of R. E. Daggs to A. L. Johns, for the reason that the plaintiff's complaint does not state facts sufficient to constitute a cause of action in equity to set aside a deed for fraud.

7th.

There is also error in this, to wit, in the action of the supreme court of Arizona in affirming the judgment of the trial court, for the reason that said judgment is erroneous each for the following reasons:

1st. Because said judgment attempts to revive a dead judgment against persons not parties thereto and carry its effect over on parties on whom there was no service, and no day in court, and long after the term, and long after the same was of record satisfied and discharged.

2nd. Because the judgment purports to adjudged that notice of *lis pendens* filed in case No. 1954 was notice to A. L. Johns and all defendants.

3rd. Because the judgment purports to order a sale of the land in case No. 1954—a case that none of the defendants in this case were party to.

4th. Because the case is founded on the judgment in case
236 1954, and the judgment shows that none of the parties to this action are liable to that judgment.

5th. Because the judgment purports to allow plaintiff to apply for a receiver at any time.

6th. Because the judgment sets the sale and satisfaction and deed aside; purports to reinstate the supposed dormant, satisfied, and dead judgment.

7th. The judgment is void for the reason that the second judgment is a nullity founded on a judgment, the cause of action never having been reinstated.

8th.

There is also error in this, to wit, in the action of the supreme court of Arizona in affirming the judgment of the trial court, because the statement of facts does not sustain the judgment.

9th.

There is also error in this, to wit, in the action of the supreme court of the Territory of Arizona in affirming the judgment of the trial court setting aside the deed from R. E. Daggs to A. L. Johns in a foreclosure suit, because no title can be litigated in an action in equity to foreclose the lien of a mortgage;

Whereas by the law of the land the said judgment should have been given for the said A. L. Johns and against the said James Wilson, and the said A. L. Johns prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment, etc.

A. J. DAGGS.
Attorney for (Defendants) Appellants.

237 In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. DAGGS, Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

October term, in the year of — Lord 1899.

Afterward, to wit, on the — day of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said R. E. Daggs and says that in the record and proceeding aforesaid there is manifest error in this, to wit:

1.

In the action of the trial court in overruling the special demurrer of R. E. Daggs to plaintiff's complaint for each of the following special reasons (being also the special grounds of demurrer), to wit:

2.

That plaintiff is not entitled to recover in this action in his own right.

3.

That plaintiff is not suing in the right of the mortgagor.

4.

That plaintiff's petition shows no privity of contract between plaintiff and defendants.

5.

That no reason is shown why plaintiff's first and former
238 judgment is sufficient.

6.

That no reason is shown why W. A. Daggs and A. L. Johns were not made parties to the original action.

7.

That no reason is shown for not applying for relief in the former foreclosure suit.

8.

That no reason is shown for a second decree, no reason being shown why plaintiff could not collect the debt by execution on his former judgment against the mortgagor.

9.

That the mortgagor is not before the court.

10.

That no separate action can be maintained on a mortgage and debt, it being shown to have once merged in the judgment.

11.

That plaintiff has joined in his petition causes of action *ex contracto* with causes of action *ex delicto*.

12.

That plaintiff has misjoined parties defendant.

13.

That plaintiff's petition shows that he already has a judgment against defendant R. E. Daggs for the same debt and mortgage that forms one of the foundations of this action.

239 14.

That plaintiff has made a mistake of law, and this court is without jurisdiction to grant relief.

2nd.

There is also error in this, to wit, in the action of the trial court in overruling the motion of R. E. Daggs for change of venue on

the grounds that the trial judge was so prejudiced against the defendants that they could not have a fair and impartial trial.

3rd.

There is also error in this, to wit, in the action of the trial court in overruling the motion of R. E. Daggs for a continuance of this cause on the grounds of the absence of material witness, John S. Armstrong, the mortgagor, who would testify that the defendant sued on in this case had been fully paid and discharged by him.

4th.

There is also error in this, to wit, in the action of the trial court in overruling the motion of R. E. Daggs for judgment on the evidence on the grounds that "the evidence introduced by the plaintiff is not sufficient to warrant the relief prayed for," and on the grounds that "there is no evidence to sustain the allegations of the complaint."

5th.

There is also error in this, to wit, in the action of the supreme court of Arizona in affirming the judgment of the trial court, because said judgment is void for the following reasons:

1st. Because no summons was served on John S. Arm-
240 strong, against whom the judgment was rendered.

2nd. Because the deed of Johns was set aside as fraudulent and void and judgment rendered at the time against Johns on the same deed.

6th.

There is also error in this, to wit, in the action of the district court in its ruling on the admission of evidence and in admitting incompetent, irrelevant, and immaterial evidence over the objection of R. E. Daggs. Said evidence is as follows, to wit:

1.

Q. After the sheriff's sale and the delivery of the deed upon sale, under the execution in case of Wilson against Armstrong and R. E. Daggs, state whether or not you took a sheriff's deed and went down to the lands in question in this case.

Defendant objects to the question as immaterial, incompetent, and irrelevant, and for the further reason that it is not shown that any such case exists.

Objection overruled, and defendant excepts to the ruling of the court.

2.

Q. Yes; it was for the purpose of getting possession, was it not?
WITNESS: Yes, sir; I saw Mr. Daggs there and Mrs. Daggs.
Q. You asked possession of them and was refused?
A. Yes, sir.

(Defendants object and move to strike out answer.)
(Motion is denied, and defendants except.)

241 3.

PLAINTIFF'S EXHIBIT B.

This indenture made this 18th day of December, A. D. 1895, between John S. Armstrong of the town of Tempe, A. T., the party of the first — and Robert E. Daggs of Chicago, State of Illinois, *that* the party of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of eleven hundred dollars to him in hand paid by said party of the second part does by these presents grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, that certain real property situate, lying and being in Maricopa county, Territory of Arizona, described as follows, to wit:

(Here follows a description of the property as alleged by plaintiff.)

To have and hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging to said Robert E. Daggs, his heirs and assigns forever.

That said Robert E. Daggs hereby assumes the payment and agrees to pay two certain promissory notes, each for the sum of three thousand two hundred and fifty (3,250) dollars executed by said John S. Armstrong on or about Apr. 18th, 1893, to James Wilson and Desda A. Wilson his wife and secured by mortgage of the same date as notes on the land hereby conveyed.

And that said John S. Armstrong binds himself, his heirs and executors and administrators to warrant and forever defend all and singular the said premises unto said Rob't E. Daggs his heirs and assigns against every person whomsoever lawfully claiming
242 the same or to claim the same or any part thereof. In witness whereof said party of the first part has hereunto set his hand and seal the day and year first above written.

JNO. S. ARMSTRONG. [SEAL.]

Defendant R. E. Daggs objects to the same because it does not refer to any matters in this suit and is immaterial, incompetent, and irrelevant. Objection overruled, and defendant excepts.

V.

The London Company is a corporation here in this Territory, an Arizona corporation.

Q. When was it organized?
A. It has been in existence for two years or more.

Defendants object to that, as it has no relevancy to the issues in this case.

By the COURT: Is there any *lis pendens* on file?
By Mr. ARMSTRONG: Yes; in the original case at that time.

Objection is overruled. Defendants except.

A. I cannot tell without referring to the records when the London Company was incorporated.

Q. Is it incorporated in this county?

A. Yes, sir.

Defendant- objects to the question as incompetent and immaterial. Objection is overruled, and defendant- excepts.

—. What other property had the London Company at the time it transferred its stock of $10,000 to A. L. Johns?

Defendants object to any testimony relative to the London
243 Company for the reason that it is not a party to this suit. It is incompetent, immaterial, and irrelevant. Objection overruled by the court, and defendant- excepts.

A. It has about 320 acres of alfalfa land in this valley and 600 acres in Coconico county, in this Territory, and a contract and guarantee — sufficient money to buy 500 head of cows and $50,000. I think that this land—this 320 and 600 acres—was free from incumbrances. I do not know. The deed will show why the deed from the London Company to A. L. Johns was given. The deed will show how long before it was recorded it was dated. He attended to it. I think the president recorded it. I think I have seen the deed. I will state for your information that I did not have anything to do with the transaction, but the president made the purchase.

Q. What consideration did you receive from A. L. Johns for this land on March 17th, 1894?

Defendant- object to the question because it has no reference to the issues in this case. Objection overruled, and defendant- excepts.

A. The express consideration was $11,500. I received $11,500. I got cattle and other property in the valley, and this was figured in the $11,500, and it was pertaining to this trade. There was a lot of notes and accounts. There was some grain and other property—some live stock.

PLAINTIFF'S EXHIBIT B.

Warranty Deed.

244 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Know all men by these presents, that I, R. E. Daggs of the city of Chicago, county of Cook, State of Illinois, for and in consideration of eleven thousand five hundred dollars ($11,500.00) to me in hand paid by A. L. Johns of Chicago, county of Cook, State of Illinois have guaranteed, sold and conveyed unto the said A. L. Johns all that certain premises described as follows, viz:

(Here follows description as set out in plaintiff's complaint.)

The said A. L. Johns buys the herein-described lands with full knowledge of the now-existing James Wilson and Desda Wilson

mortgage of six thousand five hundred dollars and hereby assumes and agrees to pay the same.

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging to the said A. L. Johns heirs and assigns forever. And I hereby bind myself, my heirs and executors and administrators to warrant and ever defend all and singular the premises unto said A. L. Johns except the Wilson mortgage mentioned herein, heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

And the parties herein further agree that this contract is made under the statute of Arizona now in force and that the said statutes shall govern the construction of this deed.

Witness my hand this seventeenth day of March, 1894.

R. E. DAGGS. [SEAL.]

245 Filed and recorded, at the request of Bank of Tempe, April 28th, 1894, at 8.30 a. m., Book 36 of Deeds, pages 110, 111, 112.

NERI OSBORN,
County Recorder.
H. C. MEADOR, *Deputy.*

Plaintiff offers the same in evidence, asks to have the same identified as Exhibit B in place of original deed, which is commanded and refused.

Defendant- objects to the introduction of the same.

Mr. ARMSTRONG: We will ask to have the reporter copy this into the record hereafter.

By R. E. DAGGS: We object to the introduction of the deed because it is not an instrument purporting to have any bearing upon the issues in this case, and it is immaterial, incompetent, and irrelevant.

Objection overruled, and defendant- excepts.

7th.

There is also error in this, to wit, in the action of the supreme court of Arizona in affirming the judgment of the trial court, for the reason that said judgment is erroneous each for the following reasons:

1st. Because said judgment attempts to revive a dead judgment against persons not parties thereto and carry its effect over to parties on whom there was no service and no day in court and long after the term and long after the same was record-, satisfied and discharged,

2nd. Because the judgment purports to adjudge that the notice of *lis pendens* filed in case No. 1954 was notice to A. L. Johns
246 and all defendants.

3rd. Because the judgment purports to order a sale of the land in case No. 1954, a case that none of the defendants in this case were party to.

4th. Because the case is founded on the judgment in case No. 1954, and the judgment shows that none of the parties to this action are liable to that judgment.

5th. Because the judgment purports to allow the plaintiff to apply for a receiver at any time.

6th. Because the evidence introduced by the plaintiff, being Exhibit A, shows that sheriff sold the land at public sale and received the cash and paid it to the plaintiff.

7th. Because the judgment sets the sale and satisfaction and deed aside, purports to reinstate the supposed dormant, satisfied, and dead judgment.

8th. The judgment is void for the reason that the second judgment is a nullity founded on a judgment, the cause of action never having been reinstated.

8th.

There is also error in this, to wit, in the action of the supreme court of the Territory of Arizona in affirming the judgment of the trial court setting aside the deed from R. E. Daggs to A. L. Johns in a foreclosure suit, because no title can be litigated in an action in equity to foreclose the lien of a mortgage.

9th.

There is also error in this, to wit, in the action of the
247 supreme court of Arizona in affirming the judgment of the trial court, because the statement of facts does not sustain the judgment;

Whereas by the law of the land the said judgment ought to have been given for the said R. E. Daggs and against the said James Wilson, and the said R. E. Daggs prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment, etc.

A. J. DAGGS,
Att'y for Appellants.

In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. DAGGS, Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

October term, in the year of — Lord 1899.

Afterward, to wit, on the — day of October, in this term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said A. J. Daggs and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st.

In the action of the trial court in overruling the general
248 demurrer of A. J. Daggs on the grounds and for the reason that plaintiff's complaint does not state facts sufficient to constitute a cause of action against him.

2nd.

There is also error in this, to wit, in the action of the trial court in overruling the motion of A. J. Daggs for a change of venue on the grounds that the trial judge was prejudiced against him; that he could not have a fair and impartial trial before said judge.

3rd.

There is error in this also, to wit, in the action of the trial court in overruling the motion of A. J. Daggs for a continuance of this cause on the grounds of the absence of the witness John S. Armstrong, the mortgagor, who would testify that the defendant sued on in this case had been fully paid off and discharged by him.

4th.

There is error also in this, to wit, in the action of the trial court in overruling the motion of A. J. Daggs for judgment on the evidence on the grounds that "the evidence introduced by the plaintiff is not sufficient to warrant the relief prayed for," and on the grounds that "there is no evidence to sustain the allegations of the complaint."

5th.

There is also error in this, to wit, in the action of the supreme court in affirming the judgment of foreclosure against A. J.
249 Daggs for the reason that the statement of facts *are* not sufficient to warrant a judgment of foreclosure against him.

6th.

There is also error in this, to wit, in the action of the supreme court of the Territory of Arizona in affirming the judgment of the trial court setting aside the deed from R. E. Daggs to A. L. Johns in a foreclosure suit, because no title can be litigated in an action in equity to foreclose the lien of a mortgage;

Whereas by the law of the land the said judgment ought to have been given for the said A. J. Daggs and against the said James Wilson, and the—A. J. Daggs prays that the judgment aforesaid may be reversed, annulled, and all together held for naught, and that he be restored to all things which he hath lost by occasion of said judgment, etc.

A. J. DAGGS,
Attorney for (Defendants) Appellants.

In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. DAGGS, Plaintiffs in Error,
vs.
JAMES WILSON, Defendant in Error.

October term, in the year of — Lord 1899.

Afterward, to wit, on the — day of October, in this term, before the justices of the Supreme Court of the United States,
250 at the Capitol, in the city of Washington, comes the said W. A. Daggs and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st.

In the action of the trial court in overruling the general demurrer of W. A. Daggs on the grounds and for the reason that plaintiff's complaint does not state facts sufficient to constitute a cause of action against him.

2nd.

There is also error in this, to wit, in the action of the trial court in overruling the motion of W. A. Daggs for a change of venue on the grounds that the trial judge was prejudice-against him; that he could not have a fair and impartial trial before said judge.

3rd.

There is error also in this, to wit, in the action of the trial court in overruling the motion of W. A. Daggs for a continuance of this cause on the grounds of the absence of the witness John S. Armstrong, the mortgagor, who would testify that the defendant sued on in this case had been fully paid off and discharged by him.

4th.

There is error also in this, to wit, in the action of the trial court in overruling the motion of W. A. Daggs for judgment on the evidence on the grounds that "the evidence introduced by the plaintiff is not sufficient to warrant the relief prayed for," and on
251 the grounds that "there is no evidence to sustain the allegations of the complaint."

5th.

There is also error in this, to wit, in the action of the supreme court in affirming the judgment of foreclosure against W. A. Daggs, for the reason that the statement of facts *are* not sufficient to warrant a judgment of foreclosure against him.

6th.

There is also error in this, to wit, in the action of the supreme court of the Territory of Arizona in affirming the judgment of the

trial court setting aside the deed from R. E. Daggs to A. L. Johns in a foreclosure suit, because no title can be litigated in an action in equity to foreclose the lien of a mortgage;

Whereas by the law of the land the said judgment ought to have been given for the said W. A. Daggs and against the said James Wilson, and the said W. A. Daggs prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he be restored to all things which he hath lost by occasion of said judgment, etc.

A. J. DAGGS,
Attorney for (Defendants) Appellants.

252 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Territory of Arizona. }

I, Lloyd Johnston, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing appeal and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 251, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs, plaintiffs in error, against James Wilson, defendant in error, as the same remain of record and on file in said office.

Also that the citation, statement of facts, and objections and exceptions to admission and rejections of evidence, attached hereunto, are the original citation, statement of facts, and objections and exceptions to admission and rejections of evidence issued by said supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In testimony whereof I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed, at the city of Phœnix, in the Territory of Arizona, this 6th day of May, 1899.

LLOYD JOHNSTON,
Clerk of the Supreme Court of the Territory of Arizona.

253 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants,
vs.
JAMES WILSON, Appellee.
} Statement of Facts.

The court finds the facts in the above-entitled case to be as follows:

I.

That on the 24th day of April, 1893, one John S. Armstrong executed a mortgage on certain real estate, described in the complaint herein, to one James Wilson to secure the payment of two

certain promissory notes in said complaint set forth, each being for the sum of $3,250.00 and interest and dated on said 24th day of April, 1893.

II.

That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant (appellant here) R. E. Daggs, and conveyed the same by certain deed of conveyance, in which said defendant, R. E. Daggs, agreed and bound himself, his heirs, executors, and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

III.

That on the 26th day of April, 1894, default having been made in the payment of the said notes secured by said mortgage, the said Wilson commenced an action in the district court of Maricopa county against the said Armstsong and said R. E. Daggs for the recovery of the amount due upon said notes and for the fore-
254 closure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder of said county.

IV.

That at the time of the beginning of said suit the defendant W. A. Daggs was in the possession of the said premises, and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

V.

That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the 8th day of May, 1894, against the said defendants, J. S. Armstrong and R. E. Daggs, for the full amount due, with costs, and for the foreclosure of the mortgage.

VI.

That thereafter and on the 6th day of June, 1894, the said premises were sold by the sheriff of Maricopa county under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said sheriff, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs, then being found in possession, refused to surrender the same and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that

time to the present continued to hold and occupy said premises and property as such tenant of A. L. Johns to the total exclusion of plaintiff, James Wilson.

255 VII.

That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action and the filing of the *lis pendens* aforesaid, a deed was placed on record in the office of the county recorder of said county, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns, of Chicago, Illinois.

That at the time the demand for possession, as aforesaid, was made by said Wilson upon the defendant W. A. Daggs said W. A. Daggs claimed and asserted that on the first day of April, 1894, he ceased to be the tenant of R. E. Daggs and thereupon became the tenant of said A. L. Johns, and took possession of said property for said Johns at said time, and from that time forward held possession of said premises as the tenant of said A. L. Johns and not as the tenant of said R. E. Daggs.

VIII.

That at the time of the commencement of said action to foreclose said mortgage the said plaintiff in said action, James Wilson, had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim to said premises.

IX.

That said defendants, R. E. Daggs and A. J. Daggs, did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

256 That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs and for the purpose of hindering, delaying, and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.

RICHARD E. SLOAN,
Presiding Justice.
FLETCHER M. DOAN, *A. J.*
WEBSTER STREET, *C. J.*
GEO. R. DAVIS, *A. J.*

257 [Endorsed:] No. 621. In the supreme court of the Territory of Arizona. A. L. Johns *et al.*, appellants, *vs.* James Wilson, appellee. Statement of facts. Filed March 16th, 1899. Lloyd Johnston, clerk. Filed *nunc pro tunc* as of Oct. 1st, 1898.

258 In the Supreme Court of the Territory of Arizona.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. Daggs, Appellants, *vs.* JAMES WILSON, Appellee.	Objections and Exceptions to Admission and Rejection of Evidence.

I.

Be it remembered that on Dec. 21st, 1896, this cause came regularly on for trial before Hon. A. C. Baker, judge of the district court of the third judicial district of the Territory of Arizona, Maricopa county, the plaintiff appearing by his counsel, Thomas Armstrong, Jr., and the defendants present by their counsel, A. J. Daggs, Esq. The following evidence was produced by the plaintiff (appellee) and offered and admitted by the court over the objection and exception of the defendants (appellants) at time the same was admitted by the court:

Major EVANS, a witness called — sworn, *and* testified on behalf of the plaintiff as follo*rs*, to wit:

Q. After the sheriff's sale and the delivery of the deed upon sale — the execution in case of Wilson against Armstrong and R. E. Daggs, state whether or not you took a sheriff's deed and went down to the lands in question in this case.

Defendant- objects to the question as immaterial, incompetent, and irrelevant, and for the further reason that it is not yet shown that any such case exists. Objection overruled, and defendant- excepted to the ruling of the court.

259 WITNESS: I don't remember whether I took the deed that the sheriff gave to this land in question or not when I went and demanded possession of the property, but as soon as the deed was delivered to me I had it recorded, and it was subsequent to that time that I made demand for the possession of the property. I found W. A. Daggs in possession. I did not obtain possession of the property. W. A. Daggs said he would not give possession of the property then, but he would consider later and let me know; but he subsequently said that he refused to give it up.

Defendant moved to strike out the answer because it was not in the presence of the defendant Johns. Objection overruled and defendant- except.

Q. Yes; it was for the purpose of getting possession, was it not? WITNESS: Yes, sir. I saw Mr. Daggs there and Mrs. Daggs.

Q. You asked possession of them and was refused?
A. Yes, sir.

(Defendants object and move to strike out answer.)
(Motion is denied and defendants except.)

II.

Also witness F. W. Sheridan called, duly sworn, and testified on behalf of the plaintiff as follows, to wit:

I have Book 36 of Deeds, records of Maricopa county. On page 110 is recorded a warranty deed of R. E. Daggs, in the city of Chicago, county of Cook and State of Illinois.

PLAINTIFF'S EXHIBIT B.

This indenture, made this 16th day of December, A. D. 1895, between John S. Armstrong, of the town of Tempe, A. T., the party of the first part, and Robert E. Daggs, of Chicago, State of Illinois, that party of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of eleven thousand dollars to him in hand paid by the said party of the second part, does by these presents grant, bargain, sell, and convey
260 unto said party of the second part and to his heirs and assigns forever that certain real property situated, lying, and being in Maricopa county, Territory of Arizona, describes as follows, to wit:

All that portion of the northeast quarter (N. E. ¼) of section twenty-one (21), of township one (1), north range four (4), east Gila and Salt River base and meridian, bounded on the north by Eight- street and on the east by Farmers' avenue, as laid out on a map of the town of Tempe, recorded in Book 2, page 26, of maps in the office of the recorder of said Maricopa county, excepting therefrom the following-described tracts of land: 1st. Forty acres commencing its boundaries at a point on the south boundary line of said quarter section in the center of Farmers' avenue, running thence west eighty (80) rods; thence north eighty (80) rods; thence east eighty (80) rods; thence south eighty (80) rods along the center of Farmers' avenue to the place of beginning. 2nd. A lot of land belonging to Edward A. Murphy, beginning at a point in the center of Eight-street two hundred and forty-two and one-half (242½) feet west from the center of the Maricopa and Phœnix railroad track, running thence south one hundred and fifteen (115) feet to a post; thence west two hundred and thirty-six (236) feet to the center of Eight-street; thence along the center of Eight- street two hundred and thirty-six feet (236) feet to the place of beginning.

3rd. A lot of land belonging to Walter S. Johnstone, beginning at a stake at the northeast corner of the lot now owned by Edward A. Murphy as above described, running thence west along the south boundary line of Eight- street six hundred and twenty-nine and four-tenths ($629\frac{4}{10}$) feet to a point being the northeast corner of the

land hereby excepted, thence south one hundred and forty-two (142) feet; thence west one hundred and thirty-seven and three-tenths ($137\frac{3}{10}$) feet; thence north one hundred and forty-two (142) feet; thence east one hundred and thirty-seven and three-tenths ($137\frac{3}{10}$) feet to the northeast corner of the lot hereby excepted. The land hereby conveyed containing one hundred and eleven (111)
261 acres, more or less, together with a *pro rata* share, number sixty-six (66), in Tempe irrigating canal, and water represented thereby; also a *pro rata* of share number two (2) in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* share numbered sixty-six (66), in said Tempe irrigating canal, to have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto said Robert E. Daggs, his heirs, and assigns forever.

The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of three thousand two hundred and fifty (3,250) dollars, executed by said John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson his wife, and secured by mortgage of the same date, as said notes on the land hereby conveyed. And said John S. Armstrong binds himself, his heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto said Rob't E. Daggs, his heirs, and assigns against every person whomsoever lawfully claiming the same or to claim the same or any part thereof.

In witness whereof said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN S. ARMSTRONG. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, W. L. Van Horn, a notary public in and for said county and Territory, on this day personally appeared John S. Armstrong, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this eighteenth day of December, A. D. 1893.

W. L. VAN HORN,
Notary Public.

262 Recorded, at the request of the Bank of Tempe, Dec. 19, 1893, at 8.10 a. m., Book 35, page- 268, 269, 270.

NERI OSBORN,
County Recorder.

Plaintiff offers the same in evidence, asks to have the same identified as Exhibit B in place of the original deed, which is commanded and refused.

Defendant- object to the introduction of the same.

Mr. ARMSTRONG: We will ask to have the reporter copy this into the record hereafter.

By R. E. DAGGS: We object to the introduction of the deed, because it is not an instrument purporting to have any bearing upon the issue in this case, and it is immaterial, incompetent, and irrelevant.

Objection overruled and defendant excepts. Defendant A. J. Daggs makes the same objection. Same ruling by the court and exception taken.

III.

Plaintiff (appellee) also introduced in evidence the deposition of A. L. Johns over the objection and exception of defendants (appellants) as follows:

PLAINTIFF'S EXHIBIT C.

Deposition of A. L. Johns.

Interrogatory 1st. Where do you reside, and what is your name, age, and occupation?

Answer. Chicago, Cook county. I am A. L. Johns; live stock commission and real estate; 33 years.

Interrogatory 2nd. Are you one of the defendants in the above-entitled cause?

Answer. I am.

Interrogatory 3rd. Are you acquainted with the plaintiff in the above-entitled cause?

Answer. I am not, only as his name appears in the ab-
263 stracts furnished me by Mr. Daggs.

Interrogatory 4th. Are you acquainted with your codefendants in the above-entitled cause?

Answer. With A. J. Daggs only.

Interrogatory 5th. During the month of March, 1894, did you or did you not purchase one hundred acres, more or less, of the northwest one-fourth (N. W. ¼) of section nineteen (19), township one (1) south, of range fove (5) east, of Gila and Salt River base and meridian, in Maricopa county, Arizona Territory?

Answer. I did.

Interrogatory 6th. If you state in your answer to interrogatory 5th that you did purchase — land described in said interrogatory, state from whom you purchased and what you paid therefor.

Answer. I purchased from Robert E. Daggs, through his agent, A. J. Daggs, and paid the sum of two thousand four hundred and fifty ($2,450.00) — for the land described and the water rights connected therewith.

Interrogatory 7th. If you state in your answer to interrogatory

5th that you purchased the land mentioned therein, state whether or not you have paid the purchase-money in full.

Answer. I have paid the money in full for the land and water, and hold receipts in full for the same.

Interrogatory 8th. If you state in your answer to interrogatory 7th that you paid the purchase-money, state when you paid it.

Answer. I paid the purchase-money when I received the warranty deed of the land, March 17th, 1894.

Interrogatory 9th. If you state in answer to the above interrogatory that you purchased said land, state whether abstracts were furnished you, and whether or not you had the abstracts, if one was furnished you, passed upon by an attorney or abstractor.

Answer. Yes; abstracts were furnished me, and I had them passed upon by an attorney.

Interrogatory 10th. Did you ever have previous to the
264 bringing of this suit any information to the effect that the purchase-money for above-described land had never been paid to the plaintiff in this action?

Answer. No, sir; I never had any information to that effect whatever until I received through the mail a copy of petition purporting to bring suit for the purchase price of said lands some time about the first of June.

Interrogatory 11th. Do you now own the above-described land?

Answer. I do not.

Interrogatory 12th. If in answer to interrogatory 11th you answer that you do not own the land, you may state what you have done with the same.

Answer. I have sold the above-described land to A. J. Daggs, Scotland county, Missouri, for the price and consideration of twenty-six hundred dollars ($2,600), which sum I have received in full in cash.

Interrogatory 13th. If in your answer to interrogatory 12th you answer that you have sold the land, state to whom you have sold it, at what price, and whether or not the purchase price has been fully paid.

Answer. As I stated in previous answer, I have sold the above lands, got my pay in full, and received payment in cash.

Interrogatory 14th. State any facts within your knowledge which may be material to either plaintiff or defendants in the above-entitled action.

Answer. I have stated all the facts relating to the purchasing and selling of this land.

Cross interrogatories.

Interrogatory 1st. What relation are you by blood or marriage to the Daggs, who are defendants?

Answer. None at all.

Interrogatory 2nd. How long have you known the Daggs?
265 A. I have known A. J. Daggs since February or March, 1894.

Interrogatory 3rd. Were you ever at Tempe, in this county and territory?

A. I was.

Interrogatory 4th. What is your business or occupation?

A. Live stock commission and real estate.

Interrogatory 5th. State fully how you came to purchase the land described in the direct interrogatories. State fully.

A. I am subject to rheumatism in Chicago climate. I decided to change climate and pass the winters in warmer country, and being acquainted with the climate of the western portion of the United States, I advertised in the Chicago Drovers' Journal for lands in the southwest. New Mexico or Arizona preferred, thinking to engage in winter season in the maturing and fattening stock and hold them on alfalfa for the high spring markets in Chicago, and on shipment in the spring return to my business here. I received numerous letters from southern districts, together with a personal letter from A. J. Daggs, representing himself as the agent of R. E. Daggs. He stated he had seen my advertisement in the Chicago Drovers' Journal and had called upon me for the purpose of offering some lands in the Salt River valley, Maricopa county, Arizona Territory. He showed me maps of that country, and after some considerable examination and talk I concluded, and so informed Mr. Daggs, that I would purchase his hundred-acre tract and a tract adjoining Tempe, known as Wilson tract, as the hundred-acre tract in section 19, above described was under the Tempe canal; that I was acquainted with this canal, and knew it to be one of the oldest and best canals in the valley, provided he would furnish me abstracts of title showing the land to be clear and unincumbered. The abstracts Mr. Daggs furnished as requested. I submitted them to my attorney and instructed him to examine them carefully and to report to me his conclusions. In a day or two my attorney brought the abstract to my office and informed me as far as
266 he could ascertain from the abstracts that the land in question were free and unincumbered. I thereupon saw Mr. A. J. Daggs and informed him that his money was ready for his one-hundred-acre tract, and the water rights connected therewith in the Tempe canal whenever he delivered me a warranty deed for both land and water. He produced the deed on or about the 17th day of March, A. D. 1894, and I paid him two thousand five hundred and fifty dollars (2,550.00) in cash, the price agreed, and took his deeds; also his receipt for money in full.

Interrogatory 6th. If you have answered that you purchased and paid for the aforesaid lands, state fully when you paid the same, who you paid, where you paid, and how payments was made, if in cash or by drafts. Answer fully.

Answer. I paid for land and water rights at the time deed was delivered to me, on 17th of March, 1894; A. J. Daggs, as agent for Robert E. Daggs, at my office, in Chicago, Cook county, Illinois, in cash, and received receipt in full.

A. L. JOHNS.

Subscribed and sworn to before me this 6th day of October, A. D. 1894.

SIMON W. KING,
Commissioner for Arizona at Chicago Illinois.

Defendants object to the introduction of the same because defendants have no notice about the production of this instrument. Defendant R. E. Daggs objects to same as incompetent, immaterial, and irrelevant. Objection overruled and exception taken. Same admitted as Plaintiff's Exhibit C.

IV.

Also R. E. DAGGS, a witness called — sworn, *and* testified for plaintiff (appellee) over the objection and exception as follows:

The London Company is a corporation here in this Territory, an Arizona corporation.

267 Q. When was it organized?

A. It has been in existence for two years or more.

Defendants object to that, as it has no relevancy to the issues in this case.

By the COURT: Is there any *lis pendens* on file?

By Mr. ARMSTRONG: Yes; in the original case at that time.

Objection is overruled. Defendants except.

A. I cannot tell without referring to the records when the London Co. was incorporated.

Q. Is it incorporated in this county?

A. Yes, sir.

Defendants objects to the question as incompetent and immaterial. Objection is overruled, and defendants excepts.

Q. What other property has the London Co. at the time it transferred its stock of $10,000 to A. L. Johns?

Defendants objects to any testimony relative to the London Co. for the reason that it is not a party to this suit: it is incompetent, immaterial, and irrelevant. Objection overruled by the court, and defendant- excepts.

A. It has about 320 acres of alfalfa land in this valley and 600 acres — Coconino county, in this Territory, and a contract and guarantee for sufficient money to buy 500 head cows and $50,000. I think that this land—this 320 and 600 acres—was free from incumbrance. I do not know. The deed will show why the deed from the London Co. to A. L. Johns was given. The deed will show how long before it was recorded that it was dated. He attended to it. I think the president recorded it. I think I have seen the deed. I will state for your information that I did not have anything to do with the transaction, but the president made the purchase.

Q. What consideration did you receive from A. L. Johns for this land on March 17th, 1894?

Defendants object to the question because it has no reference to the issues in this case. Objection overruled, and defendant excepts.

A. The expressed consideration was $11,500. I received $11,500. I got cattel and other property in the valley, and this was figured in the $11,500, and it was pertaining to this trade; there was a lot of notes and accounts. There was some grain and other property, some live stock.

V.

Plaintiff (appellee) introduced in evidence the following deed over defendants' (appellants' objection and exception at trial:

PLAINTIFF'S EXHIBIT B.

Warranty Deed.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Know all men by these presents that I, R. E. Daggs of the city of Chicago, county of Cook, State of Illinois, for and in consideration of eleven thousand five hundred dollars ($11,500) to me in hand paid by A. L. Johns of Chicago, county of Cook, State of Illinois, have *guaranteed* sold, and conveyed unto the said A. L. Johns all that certain premises described as follows, viz:

All that certain portion of the northeast quarter (N. E. ¼) of section twenty-one (21) of township one (1) north range (4) east Gila Salt River base and meridian, bounded on the north by Eight- street and on the west by Farmers' avenue, and laid out on a map of the town of Tempe, recorded in Book Two (2) page 25 of maps in the office of the recorder of deeds of said Maricopa county, excepting therefrom the following-described tracts of land to wit:

1st. Forty acres commencing its boundaries at a point on the south boundary line of said quarter section in the center of Farmers' avenue, running thence west eighty rods (80) thence north — (80) rods, thence east eighty (80) rods thence south eighty (80)
269 rods along the center of Farmers' avenue to the place of beginning.

2nd. A lot of land belonging to Edward A. Murphy, beginning at a point in the center of Eight- street two hundred and forty-two and a half (242½) feet west from the center of the Maricopa and Phœnix Railroad tract running thence south one hundred and fifteen (115) feet to a post, thence west two hundred and thirty-six (236) feet to a post, thence north one hundred and fifteen (115) feet to the center of Eight- street, thence alongthe center of Eight- street two hundred and thirty-six (236) feet to the place of beginning.

3rd. A lot of land belonging to Walter S. Johnson beginning at a stake at the northeast corner of the lot now owned by Edward A. Murphy as above described running thence west along the south boundary line of Eight- street six hundred and twenty-nine and

four-tenths (629.3) feet to a point being the northeast corner of the land hereby excepted, thence south one hundred and forty-two (142) feet, thence east one hundred and thirty-seven and three-tenths (137.3) feet to the northeast corner of the lot hereby excepted.

The land hereby conveyed containing one hundred and eleven (111) acres more or less. Together with *pro rata* of share number sixty-six (66) in the Tempe irrigation canal and water represented thereby also a *pro rata* of shares number two (2) in the McKinney and Kirkland ditch and right of way through all lateral ditches to the land hereby conveyed for the water represented by said *pro rata* of share number sixty-six (66) in said Tempe irrigation canal. The said A. L. Johns buys the herein described lands with full knowledge of the now-existing James Wilson and Desda Wilson mortgage of six thousand five hundred dollars and hereby assumes and agrees to pay the same.

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in any-
270 wise belonging to the said A. L. Johns heirs and assigns forever. And I hereby bind myself, my heirs and executors and administrators to warrant and ever defend all and singular the premises unto the said A. L. Johns except the Wilson mortgage mentioned herein, heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof. And the parties herein further agree that this contract is made under the statute of Arizona Territory now in force and that the said statutes shall govern the construction of this deed.

Witness my hand this seventeenth day of March, 1894.

R. E. DAGGS. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, E. M. Doe, a notary public in and for said county of Coconino, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and further declared himself to be single and unmarried.

Given under my hand and seal of office this seventeenth day of March, A. D. 1894.

E. M. DOE,
Notary Public.

Filed and recorded, at the request of Bank of Tempe, April 28th, 1894, at 8.30 a. m., Book 36 of Deeds, pages 110, 111, 112.

NERI OSBORN,
County Recorder,
By H. C. MEADOR, *Deputy.*

Plaintiff offers the same in evidence, asks to have the same identified as Exhibit B in place of original deed, which is commanded and refused.

Defendant- objects to the introduction of the same.

Mr. ARMSTRONG: We will ask to have the reporter copy this into the record hereafter.

By R. E. DAGGS: We object to the introduction of the
271 deed because it was not an instrument purporting to have any bearing upon the issues in this case, and it is immaterial, incompetent, and irrelevant.

Objection overruled, and defendant- excepts.

Defendant A. J. Daggs makes the same objection. Same ruling by the court and exception taken.

Plaintiff rests.

I hereby certify that the above and foregoing evidence was admitted by the court below over the objection and the exception of the defendants at the time; *are* correct as the same appears by the record in this cause.

By the court this 16 day of Mar., A. D. 1899.

RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
GEO. R. DAVIS, *A. J.*
WEBSTER STREET, *C. J.*

272 [Endorsed:] No. 621. In the supreme court of the Territory of Arizona. A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs, appellants, *vs.* James Wilson appellee. Objections and exceptions to admission and rejections of evidence. Filed March 16th, 1899. Lloyd Johnston, clerk. Filed *nunc pro tunc* as of Oct. 1st, 1898.

273 In the Supreme Court of the United States.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, and A. J. DAGGS, Appellants,
vs.
JAMES WILSON, Appellee.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Wilson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 28th day of November, A. D. 1898, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein A. L. Johns, W. A. Daggs, R. E. Daggs, and A. J. Daggs are appellants and you are respondent, to show cause, if any there be, why the judgment rendered against said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the first day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

RICHARD E. SLOAN,
Presiding Justice Supreme Court Territory of Arizona.

On this 23 day of November, in the year of — Lord one thousand eight hundred and ninety-eight, personally appeared
274 Joe M. Balez before me, the subscriber, *Joe M. Balez* and makes oath that he delivered a true copy of the within citation to Thos. Armstrong, Jr., the att'y of record of James Wilson, James Wilson being a non-resident and not in the Territory at this time.

JOE M. BALEZ,
Deputy Constable.

Sworn to and subscribed to the 23 day of November, A. D. 1898.

[Seal Notary Public, Maricopa County, Arizona.]

R. E. DAGGS,
Notary Public.

My commission expires April 8th, 1902.

275 [Endorsed:] In the Supreme Court of the United States. A. L. Johns, W. A. Daggs, R. E. Daggs, A. J. Daggs, appellants, *vs.* James Wilson, appellee. Citation. Filed Dec. 5th, 1898. Lloyd Johnston, clerk. Rec'd Dec. 5th.

Endorsed on cover: File No., 17,420. Arizona Territory supreme court. Term No., 306. A. L. Johns, W. A. Daggs, R. E. Daggs, & A. J. Daggs, appellants, *vs.* James Wilson. Filed May 23, 1899.

No. 69

FILED
DEC 28 1900
JAMES H. MCKENNEY
CLERK

BRIEF, ARGUMENT AND AUTHORITIES

Brief of Daggs for Appellants

CASE NO. 69

IN THE SUPREME COURT OF THE UNITED

Filed Dec. 28, 1900.

OCTOBER TERM, 1900.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, AND A. J. DAGGS, APPELLANTS.

vs.

JAMES WILSON,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

A. J. DAGGS,
Attorney for Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, AND A. J. DAGGS, APPELLANTS.

vs.

JAMES WILSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF. ARGUMENT AND AUTHORITIES.

STATEMENT OF CASE.

The facts out of which this alleged action arose as shown by the record are as follows: One John S. Armstrong, on April 24, 1893, bought of James Wilson 111 acres of land adjoining the City of Tempe, A. T., together with 66 inches of water in the Tempe canal, also Share No. 2 in the McKinney and Kirkland ditch and rights of way through all lateral ditches to the land conveyed. Also 5 lots in the City of Tempe, all in Maricopa County, Arizona Territory, (see Mtg., page 50, printed record) also (R. P. 67, F. 121, R. P. 68, F. 125) of the value of over 12,000 dollars, exclusive of the city lots. It appears that said John S. Armstrong in payment executed his two promissory notes for 3250 dollars each, in duplicate, except one note was due one year later than the other. (See Record p. 52.) To secure these two notes, said Armstrong executed a mortgage on the entire property thus purchased. (See R. P. 50.)

At that time, April 24, 1893, W. A. Daggs, one of the appellants, was then living with his family on the 111 acres farming same, as the tenant of appellee, and had been since Jan. 8, 1892. (See R. P. 65-66.)

After the sale from appellee to John S. Armstrong said W. A. Daggs became the tenant of Armstrong and continued to reside upon the property. (See R. P. 65-66.)

Afterward, on Dec. 18, 1893, said John S. Armstrong sold a part of the property, the one 111 acres of land, the 66 inches of water and all ditch rights and conveyed the same by warranty deed with covenants to R. E. Daggs for the sum of Eleven thousand dollars, ($11,000) (See R. P. 35) reserving to himself city lots in Tempe. (See R. P. 35.)

When said Armstrong sold out to R. E. Daggs (appellant), W. A. Daggs (appellant) became the tenant of R. E. Daggs and continued to reside upon the land and cultivate same. (See R. P. 66.)

Afterward on March 17th, 1894, R. E. Daggs, app., sold the 111 acres of land, 66 inches of water and ditch rights, (the same property purchased of John S. Armstrong) to A. L. Johns, of Chicago, and conveyed the same by warranty deed with covenants to said Johns, for Eleven thousand Five Hundred dollars ($11,500.00). (See R. P. 37.) W. A. Daggs arranged and became the tenant of A. L. Johns on April 1st, 1894, and continued to reside upon the land with his family and cultivate the same. (See R. P. 66.)

With these facts all in the possession of the appellee, James Wilson, he files his first piecemeal foreclosure bill, April 26, 1894. (See R. P. 39,40, 41, 42.)

His first piecemeal bill shows: (1st) That he sues John S. Armstrong, the mortgagor, and seeks a personal judgment against him upon the notes and asks to have the mortgage foreclosed on a part only of the mortgaged property, omitting therefrom the 5 city lots. (2d) That he sued R. E. Daggs on an alleged assumption of the notes and mortgage, and sought a personal judgment against him on the notes and asked to foreclose the mortgage on the same property, omitting the city lots. (See R. P. 39.) The record further shows that default was made by John S. Armstrong and R. E. Daggs. (See R. P. 45.) A judgment followed to which we call special attention. (See R. P. 45.) This judgment shows that James Wilson, appellee, took a personal judgment against John S. Armstrong, the mortgagor, for the full amount of his alleged debt. That he did not take any personal judgment against R. E. Daggs at all. That he took a foreclosure of his mortgage against John S. Armstrong, the mortgagor, and after in a subsequent clause of the judgment this language is used, to-wit:

"And that the defendant and all persons having liens subsequent to said mortgage, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of the notice of the pendency of this action in the office of the County Recorder of Maricopa County, Arizona, *on the 11th day of March, 189½*, (The suit was filed April 26, 1894.) be forever bar red and foreclosed by and from all equity of redemption and claim in and to said mortgaged premises and every part thereof from and after the expiration of said six months from the date of said sale."

It is seen the name of R. E. Daggs does not appear in the judgment except in the caption. This judgment bears date of May 8th, 1894. (See R. P. 45.)

Afterward on May 12, 1894, an order of sale issued wherein broad terms appellee declared that he had on May 8th, 1894, recovered a personal judgment against R. E. Daggs for the sum of ($7,155.08) Seven Thousand One Hundred and Fifty-five Dollars, with foreclosure of the mortgage lien. (See R. P. 47.) Also on the same day, May 12, 1894, of the issuance of this order of sale the sheriff levied upon the land described in the piecemeal foreclosure bill. (See R. P. 49.)

The same property was thereupon advertised by the sheriff (R. P. 49) and sold to one James Wilson for $7,444, which amount the sheriff declared, "I acknowledge to have received." (See R. P. 50, F. 89.) This language is followed at the same page and folio with the following language, to-wit:

"And I further certify that I deducted from the said sum of $7,444 my fees, commissions and expenses, amounting to the sum of $253.90, leaving a net balance of $7,190.10, which net balance I have paid over to plaintiff's attorney, whose receipt therefor is hereto attached, and I herewith return this writ partially satisfied in the sum of $7,190.10, there still remaining due and unpaid on said judgment interest and costs the sum of $9.50.

"J. K. Murphy, Sheriff.

"By Frank M. King, Deputy Sheriff.

"Dated June 6, 1894." (See R. P. 50, Folio 89.)

The above language is followed by the following, to-wit:

"(7,190.10.) Phoenix, A. T., June 6, 1894.

"Received from J. K. Murphy, Sheriff of Maricopa County, Arizona, the sum of $7,190.10, amount of sale in

the case of James Wilson vs. John S. Armstrong, after deducting sheriff's fees, commission and costs.

"Thomas Armstrong, Jr.,
"Attorney for Jas. Wilson, Plaintiff."

(See R. P. 50, F. 89.)

The verity of the above record has never been questioned.

Appellee rests after sale of June 6th, 1894, to June 22, 1895, when by the same attorney, Thos. Armstrong, Jr., files another peicemeal foreclosure bill, changes front, eliminates John S. Armstrong, the mortgagor, sues R. E. Daggs, the mortgagor grantee, second time on the same alleged contract of assumption of the notes and mortgage as in his first piecemeal foreclosure, and seeks to foreclose the mortgage to satisfy the damage arising from the alleged breach of the contract of assumption on the 111 acres of land, water and ditch rights mentioned in his first piecemeal foreclosure and in addition thereto includes the city lots owned by the mortgagor, John S. Armstrong.

Appellee also attacks R. E. Daggs vehemently and alleged that he had been conspiring, as he was verily informed and verily believes, in that he had withheld the deed from the record, from R. E. Daggs to A. L. Johns in order to cheat and defraud him, (see R. P. 4.) although appellee alleges this deed was filed two days after his *lis pendeu*, yet there is no such a paper in this record. And appellee prays a judgment against R. E. Daggs for such conspiracy. Appellee also now for the first time makes A. L. Johns the grantee of R. E. Daggs, a party and sues him on an alleged assumption of his alleged claim, and also seeks to foreclose the same mortgage on the 111 acres of land, water and ditch rights sought to be foreclosed in his first piecemeal foreclosure bill and in addition the city lots, to satisfy the damage arising, it is said, out of the breach of the alleged contract of assumption to pay such alleged claim. (See R. P. 1.)

Appellee attacked A. L. Johns also and after sueing him as above on a so-called assumption in the conveyance from R. E. Daggs to Johns, alleged on information and belief that A. L. Johns paid "*nothing* whatsoever for said conveyance." No further iniquity is charged against A. L. Johns except he prays for 1000 dollars, "His additional damage by reason of the premises stated as aforesaid," beside costs of this action.

Appellee also for the first time makes A. J. Daggs a party and accuses him of conspiring to "hinder, delay and obstruct" the collection of his alleged claim in connection

with R. E. Daggs, while acting as the agent of R. E. Daggs, by procuring a deed to be made, and caused same to be withheld from the record until two days after his first piecemeal foreclosure suit had been filed.

It is observed that this is same deed from R. E. Daggs to A. L. Johns, date March 17th, 1894, and filed for record April 28th, 1894. (See R. P. 35.)

Appellee next makes W. A. Daggs, the tenant, a party and accused him in furtherance of such alleged conspiracy to have "claimed and asserted" on April 28, 1894, to have abandoned the premises (the 111 acres of land) as the tenant of R. E. Daggs on April 1st, 1894, to have become the tenant of A. L. Johns, and charged that this abandonment and releasing was done secretly and without any notice to him, appellee, and that this tenant had done this renting with intent to deceive him (appellee) into the belief that R. E. Daggs was the owner of the property, and by reason of such secret renting appellee was deceived and this is the excuse he offers for not making A. L. Johns and W. A. Daggs party to his first piecemeal foreclosure and that he did not know that any other person than R. E. Daggs had any claim or interest in the property when he filed his first piecemeal foreclosure. (See R. P. 5.)

Next appellee makes the bold statement that those living in the territory liable to pay his so-called claim are insolvent, while all others are beyond the jurisdiction of the court. He does not say who is in the teritory or who is out, or whether they have or have not property, and that he is in danger of losing a portion or all of his alleged claim unless resort can be had to the pretended lien upon the property. (See R. P. 6.)

Appellee now prays that he have personal judgment against R. E. Daggs and A. L. Johns for breach of the alleged assumption of the notes, also for tax and insurance. Appellee also prays a judgment for his so-caled conspiracy for 1000 dollars' damages against R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns, not as against each, but as a lump sum against all. Appellee also prayed for a receiver to take charge of the property. (See R. P. 6.)

Appellants answered separately by general demurrer and general denial.

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

Afterward A. L. Johns and R. E. Daggs amended their answers, setting up special demurrers and other matter. The demurrers and motions were all overruled and the case went to trial.

We have assigned such error as we believe have actual substance, and instead of printing them as a whole together and then reprinting at the head of each argued. We will number them, print them in capitals at the beginning of the argument upon each *seriatum*.

The Hon. Fletcher M. Doan, in his opinion below, after quoting nearly three pages from the complaint of the appellee, said:

"The errors assigned are numerous; but as many of them are upon *immaterial points*, and some are *without merit*, it will only be necessary to consider those that go to the vital issues in the case."

Appellants are not surprised at this statement, as the honorable gentleman who wrote had served and grown old in the circuits, expounding ecclesiastical law, having failed at that, upon the election of the Honorable William McKinley and through the influence of the Hon. Sam Peters, congressman from Kansas, he was appointed judge on the Supreme bench of Arizona, and is now jurist and expounds the laws of men. And while it appears from this statement that all the errors were noticed and decided, yet further on in the opinion this language appears: "*Presuming* the decree declaring the deed void is correct and that the evidence fully sustains it," which shows that the trial branch of the contention was never looked at. That he was convinced upon reading the appellee complaint that every-day transaction were deep-seated and villainous frauds, and never examined the trial branch of the case to see whether the acts were proved or not, but *presumed* they were.

Appellants were nearly 18 months getting a statement of facts and during this time counsel for appellants approached one of the other udges, Hon. R. E. Sloan, about the statement of facts, who informed counsel that he would have to see the Hon. Fletcher M. Doan; that the case had been assigned to Doan; that Doan wrote the opinion; that he (Sloan) had merely signed it and knew nothing whatever about it.

And thus we have it, that while counsel have been criticised for assigning numerous errors, how can it be oth-

erwise when the complaint of the appellee begins by joining actions ex contracto with actions ex delecto, and actions against same defendants in which other defendants have no interest and are not charged and this complaint sustained against a demurrer of misjoinder of actions and parties, is it not true that every step thereafter is but an error? This is only one of numerous fatal defects against the complaint of appellee.

Moreover, the law compels a lawyer to assign error. The courts of ability do not always agree. How can any lawyer proceed unless he assigns every error in which he has color of logic and law to sustain and wage it before the court for consideration? Is it, then, for those of inexperience to criticising numerous assignments of error?

Owing to the manner in which the appellee sued the appellants in his blunderbus complaint, squinting at this cause of action, alluding to that cause and so mixing up in a conglomeration of statements so many different matters it is difficult for appellants to lay their assignments as they would like to do, but will attempt to reach it as concisely as possible, and beg pardon of the Honorable Court for being compelled to assign the errors thus.

An analysis of the complaint of plaintiff discloses a misjoinder of causes of action and is multifarious. Appellants A. L. Johns and R. E. Daggs each struck at this defect in their separate answers by special demurrer which was overruled by the court, assigned as error below and reassigned here.

ASSIGNMENT OF ERROR NO. 1.

"THAT THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRER OF APPELLANTS A. L. JOHNS AND R. E. DAGGS ON THE GROUND THAT APPELLEE HAS JOINED IN HIS BILL CAUSES OF ACTION EX CONTRACTO WITH CAUSES OF ACTION EX DELICTO."

The bill shows R. E. Daggs sued for the breach of an alleged contract of assumption of the two notes set out in the complaint. He is also sued to foreclose a mortgage lien to satisfy the damages arising from the breach of that alleged contract of assumption. This on actions ex contracto.

R. E. Daggs is also sued for damages for an alleged conspiracy wherein R. E. Daggs is charged to have coluded with A. J. Daggs and caused the deed of R. E. Daggs to A. L. Johns to have been withheld from the record for

about 30 days, and upon this so-called wrong and injury and action ex delicto, appellee prays damages in a lump sum against all parties concerned in it for $1000.00. These two actions ex contracto and ex delicto are joined together against R. E. Daggs.

A. L. Johns sued in this same bill upon a different alleged contract of assumption of the pretended claim. Another action ex contracto. A. L. Johns is charged with allowing the deed from R. E. Daggs to him to be withheld from the record and this act is said to be an act of conspiracy, ex delicto, and it is prayed that he, along with the others, be held under the lump sum judgment for 1000 dollars as damages. Thus an action ex contracto and an action ex delicto is joined as to A. L. Johns.

It is thus seen that upon the actions *ex conttacto* neither of these parties here had anything to do with the other's contract, and joined with these so-called actions ex contracto and ex delicto.

A. J. Daggs is alleged to have participated as agent of R. E. Daggs in the so-called conspiracy of executing and withholding the deed from R. E. Daggs to A. L. Johns from the record for about 30 days from date of its execution, and he too is joined and sued for damages along with R. E. Daggs and A. L. Johns in the lump sum of 1000 dollars.

Joined with the above alleged actions W. A. Daggs, the tenant, while he is admitted to be all the time in possession and on the premises, is charged to have declared on April 28th, 1894, to have ceased to be the tenant of R. E. Daggs and to have become the tenant of A. L. Johns on April 1st, 1894, and appellee now undertakes to say that he was by such releasing deceived into the belief that R. E. Daggs was the only person owning the premises, and now by these charges seeks to excuse himself for not having made A. L. Johns and W. A. Daggs the tenant parties to his first foreclosure and says he had no notice whatever that any other person than R. E. Daggs had any interest in the property. In his prayer W. A. Daggs is, along with the other alleged co-conspirators, asked to pay $1000 damages, (See R. P. 1 to 6 inclusive.) while W. A. Daggs is by the appellee admitted to have been in possession of the property at the date of bringing his first foreclosure.

Appellee next claims that six months after his his first judgment he went upon the premises, and there pretends to *find* the tenant, W. A. Daggs, in possession.

Now assuming without admitting that the appellee has stated causes of action in his complaint, in his judgment instead of taking a money judgment for damages, as he

had prayed, he makes his so-called conspiracy a ground for setting Johns' deed aside after he had taken personal judgment and foreclosure against him.

And we urge that the appellee complaint presents a bad case of misjoinder under the Arizona statute as well as under the equity rule of multifariousness. Such a joinder is, in violation of an express inhibition of the statute of Arizona.

Rev. Stat. A. T., Par. 670, Sec. 22, is to-wit:

"Only such causes of action may be joined as are capable of the same character of relief, but actions *ex conttacto* shall not be joined with actions *ex delicto*. In actions *ex delicto* there shall not be joined actions to recovery for injuries to the person, to property or to character, but they shall be sued for separately."

This statutory inhibition is but the adoption and repetition of the principal of the equity rule against multifariousness with which the honorable court is familiar.

"A bill is multifarious where several plaintiffs demand by one bill, several matters entirely destinct and separate or where, in the same bill several matters of distinct natures are demanded against different defendants," or to quote the time-honored formula: "The improper joining in one bill of distinct and disconnected matters and thereby confounding them."

Walker vs. Powers, 104 U. S. 245,

Where the objection is to matter it is said:

"Two things must concur, 1st the grounds of suit must be different; second each ground must be sufficient as stated to sustain a bill."

Brown vs. Guarantee Trust etc. Co. 128 U. S. 403.

The test sometimes is whether the causes of action united require separate proofs and separate decrees.

Walker vs. Powers, 104 U. S. 245, supra.

Should the court enforce these familiar principles at threshold it will do no injury to any one. Why? because the record shows that the mortgagee already has a judgment against the mortgagor which he is refusing to enforce where he well knows the mortgagor is the one he should look to for his pay. Why? Because when the mortgagor sold he got full payment for the property from his grantee and gave a warranty deed with covenants to warrant to defend the property in dispute against *all* claims. Can the mortgagor be injured? No. Why? Because he received from his grantee the cash to meet the

claim of this very appellee and agreed to pay him. The mortgagor also reserved to himself all the city lots beside, and thus so far each will be compelled to follow his own individual contracts. Will the first grantee of the mortgagor be injured? No. Why? Because he received as he testifies, from A. L. Johns all he had paid out and a profit, and he, too, warranting the property against all claims to Johns. Will the grantee of the grantee of the mortgagor be injured? No. Why? Because he will get the property he contracted and paid for and cannot complain, and will not complain, and thus each and all will be made whole and be compelled to stick to their contracts. Instead of, as it is, the appellee refusing to follow his contract and following after a remote and disputed legal right and refusing to even issue execution against his mortgagor, who is worth $30,000, in the jurisdiction of the court, and attempting to compel those to pay who never agreed to pay, and bringing a multiplicity of litigation, seeking to obtain property worth now $15,000 for an alleged claim of $6500. The court can therefore do no injury to any one by dismissing this multifarious bill, but do right:

Otherwise, if this judgment is permitted to stand, what will happen? Appellee will be enabled to receive the cash difference between the mortgage and purchase, get the property now worth $15,000 for his alleged $6,500 claim, beside have two personal judgments vs. R. E. Daggs for the claim. The mortgagor will thereby be enabled to retain the city lots and the $11,000 received from his grantee, R. E. Daggs and Johns will have two judgments against him with his deed set aside as well, and thus be enabled to keep the money he had received to pay off this very claim, and his profit and city lots.

Therefore we urge this defect to be of the substance of the action and fatal to the complaint.

Shipman's Cemmon Law Pleading, page 376, Art. 259.

It is reachable by special demurrer.

Stephens on Pleading, pages 158 and 159.

We then contend that the honorable court should dismiss this complaint and order restitution of all things to the appellants that they have lost.

ASSIGNMENT OF ERROR NO. 2.

THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON THE GOUND: "THAT THE PLAINTIFF HAS MISJOINED PARTIES DEFENDANT."

The bill shows on its face that the cause of action, so-called, of the assumption of the debt and mortgage by R. E. Daggs, that no other party to the suit has any interest in that action. It is on a separate contract pretended against R. E. Daggs.

The same is true of the alleged assumption of the same debt and mortgage by A. L. Johns. It is on a pretended contract between R. E. Daggs and A. L. Johns—W. A. Daggs and A. J. Daggs having no interest in that the alleged cause of actions for conspiracy against R. E. Daggs W. A. Daggs and A. J. Daggs or A. L. Johns is not alleged to have any connection with the so-called contracts of assumption or the notes or mortgage. It is therefore a multifarious bill as to parties.

This objection is a fatal objection under the statutes of Arizona.

Par. 692, Revised Statutes of Arizona, is as follows:

"Of the parties to the action those who are united in interests shall be joined as plaintiffs or defendants, but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint; and where the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

This rule applying to those who are united in interest is but a reiteration of a familiar rule of equity pleading, and when it appears upon the face of the bill that parties have been united as defendants who have no interest whatever in the contract set forth or torts, it is one appearing on the face of the bill, the defendants may either demur, move in arrest of judgment, or have a reversal upon writ of error or appeal.

First Ch. Pl. p. 44.

This defect is so palpable it is unnecessary to cite any authorities whatever. The honorable court should dismiss this action without further inquiry and order restitution.

U. S. vs. Alexander, 4 Crouch (cc) 311.

German Mut. Life Ins. Co. vs. Grim, 33 Ind. 249.

Crawford vs. Nolan, 70 Ia. 97.

Bartholomew vs. Candy, 14 Pick: (Mass.) 167.

Should the Court alow the complaint to pass this defect appellants A. L. Johns and R. E. Daggs make the fol-

lowing obections under their assignments of error, and the Second, Third, Fourth and Fifth assignments of error will be grouped together and argued.

These grounds of special demurrer laid in court of first instance and overruled were assigned as error in court below and reassigned for consideration here.

ASSIGNMENT OF ERROR NO. 2½.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER ON THE FOLLOWING GROUNDS, TO-WIT: "THAT THE PLAINTIFF IS NOT ENTITLED TO RECOVER IN THIS ACTION IN HIS OWN RIGHT."

3. "THAT THIS ACTION IS NOT BROUGHT, AND THE PLAINTIFF (APPELLANT) IS NOT SUEING IN THE RIGHT OF THE MORTGAGOR."

4 "THAT BECAUSE THE PLAINTIFF (APPELLEE) SHOWS NO PRIVITY OF CONTRACT BETWEEN HIM AND THESE APPLLANTS."

5. THAT BECAUSE NO REASON IS SHOWN WHY THE APPELLEE AT FIRST AND FORMER JUDGMENT IS NOT SUFFICIENT.

These appellants contend that these grounds of exception contained in their Special Exceptions, are fatal to the right of the appellee to maintain this complaint as against them, for the reason that the appellee has no cause of action against them of any kind or character on the grounds set up in the complaint, wherein the appellee purports to sue these appellants on an alleged assumption of the mortgage debt; which contract of assumption is alleged to have been made in the deeds between the grantee of the mortgagor and between the grantee of the grantee of the mortgagor; and that under the rules as laid down by this Court, that this alleged mortgagee has no cause of action whatever against either of these appellants.

The rule as laid down by this Court in Union Mut. Life Ins. Co. vs. Hawfard, 143rd U. S. 187, speaking through the learned Justice Gray, said:

"By the settled law of this Court, the grantee is not directly liable to the mortgagee, either at law or in equity, and the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor, and by virtue of the right in equity of a creditor to avail himself of any property which his debtor holds from a third person for the payment of the debt."

Citing in support of the rule, *Keller vs. Ashford, 133rd U. S. 610*, where a mortgagee attempted to maintain an action against the grantee and his mortgagor, where it appeared clear that the grantee had assumed and agreed to pay in a deed, and this Court refused to entertain the cause of action on the ground that such action could not be maintained because there was "no privity of contract."

And further said and *explained* that before such an action could be maintained it must be alleged and proved by the mortgagee that his mortgagor had been exhausted. While this record here shows appellee is refusing to make his claim off the mortgagor who is shown to be worth over $30,000, within the jurisdiction of the court.

And cited in support of the rule the cases of

Nat'l Bank vs. The Grand Lodge, 98 U. S. 103.

See also Willard vs. Wood, 135 U. S. 309.

Again it is not shown here in this bill that the grantee of the mortgagor ever had any contract or agreement with the mortgagee and in fact, it is not shown that any consideration ever passed to such mortgagee from grantees, or that he ever knew the grantees or either of them. Under such circumstances how could there be any privity of contract?

Shephard vs. May 115 U. S. 505.

The rule here announced by this Honorable Court was again put to the test in case of ——————— vs. ———————, 111th U. S. 103, where the mortgagor released his grantee from his contract of assumption and afterwards the mortgagor's mortgagee sued the grantee upon his contract of assumption, and this Court, in passing upon the question of whether or not such an action could be maintained by Mr. Justice Gray, said: "That the mortgagee had no part in obtaining and paid no consideration for that agreement, and under the most favorable construction had no greater right under it than the mortgagor with whom it had been made; or, in other words, there is no privity of contract, or that the mortgagee obtained no rights, and of course by such release by the mortgagor of his grantee, lost nothing, and could not as a consequence maintain an action against such grantee. Privity of contract must be shown."

This is undoubtedly a sound exposition of the law.

This is the rule in equity.

Storey Equity Pleadings 262, 324.

A well considered case is *Code States 64th Cal. 364, Bidell vs. Brizzolara*, which was a case where a mortgagee

had attempted to sue a grantee of his mortgagor. And the Court said:

"That the general rule is, and always has been, that a plaintiff in an action in a simple contract must be the person from whom the consideration actually moved, and that a stranger to the consideration cannot sue on the contract."

And further said: "That the rule is sometimes expressed thus. There must be privity of contract between the plaintiff and the defendant in order to render the defendant liable to an action by the plaintiff on the contract."

And further said: "That a mortgagee can only be entitled to be subrogated to an existing remedy of his debtor, the mortgagor, upon legal existing stipulations."

And further announced that his could never happen unil it was shown that the mortgagee had exhausted his creditor, the mortgagor, before the grantee could be reached by the mortgagee.

This is the rule of Common Law.

This is the rule in England.

Waring vs. Ward, 7 Ves. Jr. 332.

Oxford vs. Rodney, 14 Ves. Jr. 417.

Woods vs. Huntingford, 3 Ves. Jr. 128.

There is no Statute in Arizona announcing the rule, hence, the Courts of Arizona, the Inferior Courts, are under the direct supervision of the Supreme Court of the United States, the rules announced by the Supreme Courts of the United States as a Court of last resort from the decisions of the Courts of Arizona are binding upon the Supreme Courts of Arizona, and appellants most seriously contend that the Supreme Court of Arizona erred and disregarded settled law and the decisions of the Supreme Court of the United States on the questions here contended for; as well as the statutes of Arizona.

The statute of Arizona, however, is ample in all such cases as this to reach a debtor's debtor. How? By garnishment. Garnishee it. Garnishments may issue under the statute of Arizona. Page 62, par. 72, subdivision 2, is as follows: "Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid and that the defendant has not within his knowledge property in his possession, within this territory subject to execution, sufficient to satisfy such debt, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee."

Subdivision 3: "Where the plaintiff has a judgment and makes affidavit that the defendant has not within his knowledge property in his possession within this territory subject to execution sufficient to satisfy such judgment."

These provisions are ample to reach the so-called contract of assumption. Why was it not invoked, because the mortgagor has over $30,000 worth of real estate here in the jurisdiction of the Court in his possession and appellee would have to commit perjury to invoke these statutes upon which he would have been arrested immediately. Well it is said, even if this statute is ample by garnishment, how could this party bring in the parties that he refused to make parties to his first suit? The statute is also ample on that point. Serve them with process or inform the Court by motion and the Court will order them served and brought in.

Revised Statutes of Arizona at page 170, Par. 689, Sec 41, is as follows: "Additional parties may be brought in by proper process either by plaintiff or defendant upon such terms as the court may prescribe."

Has this appellee ever attempted to bring in these parties under the rules prescribed by the statute? No, he attempts to escape it all by saying he was deceived by some one, asserts some one is conspiring against him. Such a charge is a subterfuge and rotten. Why? W. A. Daggs, the tenant, was admittedly living openly and notoriously on the land. He was not made a party. Appellee never made him party to his first suit and appellee says the tenant claimd and asserted when he filed his last suit that he was Johns' tenant. It is also admitted that Johns placed his deed on the records only two days after his first suit was filed. Then he had not only actual, but constructive notice of Johns' title. Why did he not move under the statute to bring him in? Why? Why? Why?

This is a case where a mortgagee is refusing to receive his so-called claim from his mortgagor, his only debtor, and attempting to enforce an alleged assumption of his claim, which assumption is denied. Now mark this appellee is here attempting to enforce an alleged contract that his mortgagor, his debtor, could not enforce. Why? Because the mortgagor warranted and agreed to defend this property against all claims whatsoever, and if the mortgagor should sue his grantee he would be met immediately by the grantee's answer, who would say: "I paid you the cash to pay this claim and you agreed to warrant and defend the title to the property." Now under such circumstances, how could the mortgagor enforce this so-called assumption? He would fail. Now, how can this mortgagee have the right to

found an action on alleged contract and recover on it that the party thereto cannot enforce? This is the first case of this kind in Arizona, and it is seen that no such a proceeding exists under the laws of Arizona. No such a proceeding existed at common law or equity. The actual contractual debtor must be completely exhausted, then by showing all these facts to the Court and show the Court his suit, would not be a vexatious and harassing one. The Court would allow him to sue in the name of the mortgagor to reach an asset of the mortgagor. Here no asset exists.

Revised Statutes of Arizona, Par. 2935, is as follows: "The common law of England so far only as is consistent with and adapted to the natural and physical conditions of this territory, and the necessities of the people thereof and not repugnant to or inconsistent with the Constitution of the United States, or bill of rights or laws of this Territory or established customs of the people of this Territory is hereby adopted and shall be the rule of decision by all the courts of this Territory."

This case has been on the rough side from its inception for legal consideration. The court of first instance was presided over by an ex-minister of the gospel. When it reached the Supreme Court of Arizona it fell into the hands of another ecclesiastic, fresh from the circuits, and an examination of his opinion on the points here under discussion, it will at once be seen that he never understood the subject at all. He seemed to think that the only question before him was "a mere matter of procedure" and governed by the *lex fori*." This language was grappled from 9 Am. Eng. Ency., Pleadings and Practice, 467 and 8, and that there was no question about the *gist* of the action at all. He does not seem to have ever understood that the right must precede the remedy, and that under whatever plan of procedure the case is laid, the bill must show the *existence* of the gist, the *right to recover* or there was no *cause of action*. The principle governing these propositions have never been changed by the code. They do not depend on the remedy. They must exist before any remedy can be applied. The bill must show privity of contract, in every case, of suit upon contract, some consideration must have passed between the contractual parties. In this action he must go further and show, first, that he has exhausted the mortgagor, second, that he is notoriously insolvent and it would be useless to pursue him; third, that his judgment is ineffectual against the mortgagee; fourth, that the property is entirely inadequate to meet his demand, having already exhausted it, therefore the Supreme Courts of Arizona

erred in holding that an action could me maintained by a mortgage directly against the grantee of his mortgagor.

The appellants also contend that the Supreme Court of Arizona, as well as the District Courts thereof, are bound to exercise the rules of decision, as they are understood at Common Law and in equity, where no statute conflicts; because the Congress of the United States clothed them with Chancery and Common Law jurisdiction.

The Organic Act, Revised Statutes of the United States, Sec. 1868, is as follows:

"The Supreme Court and the District Court, respectively, of every Territory, shall possess chancery as well as common law jurisdiction."

The Common Law is expressly made to rule a decision in Arizona by legislative enactment when there is no statute in conflict therewith.

The appellants therefore respectively submit that the error here urged is also fatal to the contention of the appellee. That he has no cause of action whatever, if what he says by his bill is true. And inasmuch as he does not allege in his bill that the mortgagor has been exhausted in any manner or at all, or that he is in any manner insolvent, and shows no privity of contract and shows in no manner that his first judgment is insufficient. That no cause of action exists.. This action presents a case where a mortgagor is refusing to get his claim from his debtor and is following after a remote right of his mortgagor if it was clear that the two grantees had assumed and agreed to pay his alleged claim, which is denied. Appellants contend that the alleged claim is paid and that collusion is going on between the mort gagor and mortgagee and that they are simply gambling before the courts.

Under these assignments it is suggested that the complaint of the appellee does not show affirmation or in any way that he cannot obtain full and complete satisfaction out of his alleged first foreclosure suit, for in his bill alleges that he has judgment, but he does not say once that he ever issued execution, or that the said John S. Armstrong is not perfectly responsible; and perfectly solvent ,in fact, he is eliminated from this suit; neither does he say or show that the sheriff has ever had an opportunity to reach the mortgagoror or his property by an execution, and so far as this bill shows, the judgment is sufficient, and that the prosecution of this suit is merely vexatious.

The real estate mortgage Statute of Arizona was taken from California. In the case of Aldrich vs. Stephens, 49th Cal. 675, and the Supreme Court of California said:

"There was certainly no reason for a second decree unless the first was shown to be in some respects ineffectual to afford the relief claimed by the plaintiff."

To sustain this contention we revert again to the Statute of Arizona. Under its procedure there is no such a thing as a deficiency judgment:

Rev. Stat. of A. T., Par. 797: "Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt damages and costs with a foreclosure of the plaintiff's lien on the property subject thereto," etc.

The learned ecclesiast who wrote the opinion below, after grappling his entire statement from the so-called "complaint" in the nature of a bill in equity, which he calls "record disclosures" and upbolstered that statement with his own injections such as "the record was searched" and "supposedly as the tenant of R. E. Daggs," and "*lispendens* was filed," and that the property was "bid in by the plaintiff," which complaint his Honor took to be absolutely true without proof, or notice of the facts well plead, as well as the injections he makes himself. He then proceeds to base his opinion on the law of those jurisdictions where a deficiency judgment obtains. In Arizona a personal judgment is first taken against the debtor. The complainant can stop right there if he desires, take out his general execution and proceed to sell any piece of the proprty of th dbtor, bcause th debt is mergd by the statute into a judgment lien which covers all the property of the debtor; and if the debtor still owns the mortgaged property he can seize and sell that as well, with his general execution, and there is nothing that will require him to proceed against the mortgaged property first, or sell it, and bring the proceeds of the sale into court, and then have a deficiency judgment rendered against the debtor, upon which deficiency judgment he could take out for the first time an execution, no such practice in Arizona.

That deficiency judgment practice exists in California where the learned gentleman below says the procedure in "our courts" "is distinctly authorized" and says: "The rule is very plainly stated and the *reasons* supporting it given in *Williams vs. Noftzger, 37 Pac. 411.* His Honor then quotes three bald statements of "*abiter dictum*," from the decision, about which the Supreme Court of California itself said: "The appellants, however, *do not controvert this proposition*, but urge in support of their appeal" certain evidence insufficient to support a certain finding, and thus to the learned writer below statements of *abiter dictum* becomes controlling rules of sound reasons "distinctly authorized" by *our courts.*

He also quoted a small quotation from *Keller vs. Ashford, 133 U. S. 610*, where this court in such quotation spoke only about the remedy and said nothing about the gist of the action.

We deny the assertion that the mortgagee has any interest in such a contract except as that right existed in equity as a mere remote asset of his mortgagor or except the right to garnishee a debtor under the statute or code. He gains nor loses nothing by it. He has no part in making it and is a stranger to the consideration. If the grantee of the moragagor owes the mortgagor upon this contract, under the statute he can be garnished. The statute furnishes no other remedy. This is ample and can be enforced at the ame time he sues, or any time. We take issue with those who say the grantee is a principal debtor, such assertion but shows an effort on the part of those who assume to have found something new in the code, a new rule of Commercial law. It is not a contract made for the benefit of another but the mortgagor, and with him alone. He alone can gain or loose by it. No other. This is the settled rules of law, Aside from this it opens the door to fraud to say it is a contract made for the benefit of another, and he can enforce it without the mortgagor. Possibly he would have a defense against the mortgagee. Could it be invoked against the mortgagee? The mortgagor and mortgagee can colude and beat the grantee, or stir up a multiplicity of suits. We denounce it as sloppy practice, false logic and false law, attempted to be injected in to break down the statute to no purpose and to one's benefit.

ASSIGNMENT OF ERROR NO. 6 AND 7.

THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRERS OF APPELLANTS ON THE GROUND THAT: NO. 6—"NO REASON IS SHOWN WHY W. A. DAGGS AND A. L. JOHNS WERE NOT MADE PARTIES TO THE ORIGINAL ACTION." NO. 7—"THAT NO REASON IS SHOWN FOR NOT APPLYING FOR RELIEF IN THE FORMER FORECLOSURE SUIT," AND AS A CONSEQUENCE APPELLEE HAS NO LEGAL RIGHT TO A SO-CALLED SECOND FORECLOSURE TO THEIR INJURY.

The appellee alleged that W. A. Daggs was living upon the land in open and notorious possession, yet the appellee made no effort whatever to ascertain whether he was the owner of the property or the tenant or why he was there;

that being an admitted fact, the appellee, when he brought his original foreclosure suit, he had complete notice that the property belonged to the landlord of W. A. Daggs just as much as if A. L. Johns' deed had been upon the record.

Jones on Mortgages (5th Edition), Vol. 1,
Par. 586-87-89, and the cases there cited.

The doctrine is well settled, that where a party is in open and notorious possession of the property that it is the duty of those dealing with the title to that property to ascertain what they are doing there, and what their title is.

Phelan vs. Brady, 23 North Eastern 1100, where the Supreme Court of New York said:

"At the time of the execution and delivery of the mortgage to the plaintiff, the defendant, Mrs. Brady, was in the actual possession of the premises under a perfectly valid, but unrecorded deed. Nor is it of any consequence so far as this question is concerned whether the plaintiff was in fact ignorant of any right or claim of Mrs. Brady to the premises. It was enough that she was in possession under her deed. As that fact operated in law, as notice to the plaintiff of all her rights. Actual possession of real estate is sufficient to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish."

Again, in the late case of *Allen vs. Caldwell (Mich.), 20th N. W. 694-95*, the Court said:

"Complainant was in possession of premises at the same time defendant purchased, and although the deed to complainant was not then recorded, yet defendant could not have but known that the complainant claimed to have some interest in the premises. He should, therefore, have called upon her and ascertained the extent of the interest which she claimed therein, and from what source she derived her title; failing to do so, he is chargeable, the same as though he had called upon her and fully ascertained all the facts.

"The law is too well settled to need any extended citations of authorities, that actual possession of real estate is notice to purchasers or incumbrancers of the claim of those in possession."

2, Smith's Leading Cases, 180.
And Authority Cited.

1, Jones on Mortgages, Par. 255, 591 and *592.*

It is immaterial whether Wilson knew that Johns was in possession or not. Johns' actual possession by himself and tenant would be notice to him just the same. He cannot now shield his scheme and subterfuge behind an assertion of ignorance to the injury of A. L. Johns, R. E. Daggs and W. A. Daggs.

Jones on Mortgages (5th Edition), Vol. I, Par. 587. And Cases there Noted.

It will be observed that it is charged in the complaint that A. L. Johns went into the possession of this property without giving the appellee any notice thereof.

It would be a strange doctrine indeed that every time real property changed hands that the purchaser must go about and hunt every person who had a claim or a pretended claim and give him notice that he was going into possession and upon failure to so do it would work a forfeiture of his deed.

We can find no such doctrine asserted in the book.

In the case of *Hodges vs. Amerman (N. J.), 2 A. P. L. 260*, it is said on this point:

"But it is not necessary, in order to establish the fact of notice in such case, to show that the person to be affected by the notice knew of the possession of the other. If the possession of the other is of the character required by law; if this possession has the notoriety, certainty, conclusiveness which the law says shall constitute notice; then notice is the legal deduction from the fact of possession, and all persons dealing with the title to the land in his possession are chargeable with notice of his possession, whether they have actual knowledge of his possession or not. The reason of the rule is this: That it is the duty of the person who proposes to deal respecting the title to the particular tract of land to ascertain in advance who is in possession of it; and if he neglects this duty it is only just that he should be charged with the knowledge that he would have obtained had he performed it."

At this point reverting to the opinion of his Honor below, where he says: "This suit is brought for the purpose of *foreclosing* the *mortgage* against one who was not a party to the former suit and whose non-joinder as a party in a former suit is explained in the pleadings herein by the *ignorance* of the plaintiff of said defendant's interest in the *suit or title to the property;* and that ignorance is further explained by the allegation in the pleading that upon the conspiracy and connivance of the said defendant and other defendants

who are joined with him, all the interest of the said defendant in the suit and the claim of title to the premises on the part of the said defendant was purposely and fraudulently *withheld* from the knowledge of the plaintiff and such fraudulent concealment of fact on the part of the defendants accounted for the non-joinder in the former suit of such defendant by the plaintiff herein."

In view of the appellee bill this is an appalling statement. The appellee in his hodge podge complaint, says: "Plaintiff further shows that the said W. A. Daggs, *who had heretofore been in possession of said premises as the tenant of said R. E. Daggs* in pursuance of said conspiracy as aforesaid at or about the time of *recording the said deed to said Johns*, to-wit, on the *28th day of April, 1894, claimed and asserted to have abandoned said premises* and property as the tenant of R. E. Daggs, on or about the first day of April, 1894, and thereupon to have become the tenant of said A. L. Jotns and to have thereupon taken possession thereof for said Johns." (R. P. 5 F. 10.) He must have seen W. A. Daggs face to face at that time, April 28, 1894, only two days after he filed his first complaint, and on the same day A. L. Johns' deed was filed for record and W. A. Daggs, he says, "asserted" that he was not R. E. Daggs' tenant, but A. L. Johns' tenant. Appellee then and there had actual as well as constructive notice of Johns' deed, as well as Daggs' tenancy under him. What more is there on earth to be done to give legal notice or moral notice of the rights of A. L. Johns or W. A. Daggs? Daggs, he admits and alleges, said to him, looked him in the face, and *claimed, asserted* and told him: "I am not the tenant of R. E. Daggs and have not been since April 1st, 1894. I am the tenant of A. L. Johns, whose deed is over there in the recorder's office of record." Yet appellee boldly asserts that he was *deceived* by such secret change of possession and had no notice of either A. L. Johns' or W. A. Daggs' rights and therefore he did not make them parties, and appellants say that there is not an authority from the year books down to the present time except the learned opinion of the court below that holds under circumstances like this that the parties were not charged with full and complete notice, and are guilty of open and intentional negligence; in fact, a positive refusal to make the appellants parties. Appellee did not then care for any other than the mortgagor. He knew by the contracts of the parties the mortgagor had received the money to pay his claim from R. E. Daggs and had warranted the latter against his claim and was a rich man. And there is nothing now to prevent him getting his claim by ordinary execution against the mortgagor. But he has changed front for some

reason. We charge collusion on this point. The learned writer below cites and bases his opinion on the case of *Brocker vs. Banegas, 48 Pac., page 90 (Cal.)*, which case involved a reforeclosure against a wife upon community proper after declaration of homestead had been filed, and the plaintiff had ebployed an expert to examine th records bfore bringing his first foreclosure, which expert had overlooked the declaration of homestead by the husband and wife, and the foreclosure was therefore taken against the husband alone. Upon the showing of these facts the Court allowed a reforeclosure against the wife, and held that the original debtor was not injured thereby, for the only thing asked against him was the same judgment originally recovered, without costs or interest, or attorney fees. Is this the case here? No. The mortgagor is not before the court, and while he says he has one judgment against R. E. Daggs, in his bill his prayer here is "wherefore plaintiff prays that he have judgment against R. E. Daggs and A. L. Johns * * for the sum of six thousand five hundred dollars, with interest thereon from the 24th day of April, 1893, at the rate of 8 per cent and 10 per cent attorney fees upon the principal sum and also for the sum paid for taxes and insurance, and against said R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns for the sum of $1,000, his *additional* damages by reason of the premises stated as aforesaid, besides the costs of this action." There is no point in which these cases are parallel. (If we could revert to the judgment rendered it shows that he took a double money judgment against R. E. E. Daggs, who under his contract, his deed paid the claim once. That while he took also a double money judgment against A. L. Johns, who had paid for the property in full, and set his deed aside as well and sent him out empty handed, yet such slaughter is said to be upheld by the case cited.)

The court in that case also held that as long as the right by motion existed equity could not interfere to bring in parties, but when that right expired and no lack or want of diligence could be imputed to the party asking relief, equity could interfere. Now apply this rule in this case. Appellee, although he knew and says himself in his bill that the tenant asserted to his face two days after his suit was filed that he was Johns' tenant and A. L. Johns' deed was of record, yet appellee did not make his motion under the statutes of Arizona to bring them in as parties, but deliberately went to judgment against the mortgagor, which judgment is perfectly valid and collectable, but appellee refuses to pursue him. Now appellee waits a year and three months and charges that he was deceived by a secret change of possession of W. A. Daggs. Now is it not a lit-

tle singular that W. A. Daggs was not made a party to hi. first suit? He says he knew he was tenant of R. E. Daggs and now pretends to claim that W. A. Daggs deceived him by making a *secret change of possession*. Why did he not make him party to his first suit? Appellee has no standing under the case cited by the learned court below to support him. Now, further, we find this language in case cited by His Honor. After saying that the defendants there were not injured by a reforeclosure and that it was a mistake of fact, without negligence, said, to-wit: "Appellants argue at some length the doctrine that the record imparted notice to plaintiff and therefore there is a conclusive presumption of notice on his part as to the homestead having been declared. *This doctrine is correct when applied to purchasers or lienholders* upon the property who will be *injured* by the assertion of ignorance as to the record, but is not applicable to a case like the present; and held that "the status of the husband and wife as to the homestead is *sui generis*." It now, therefore, appears that this case is neither coincident or remotely parallel either in fact or law with the case of appellee before this Court, but is in favor of appellant. That while the Court in that case admits that the rule is correct where applied to a *purchaser* or lienholder, it holds that those with whom they were concerned were neother, but a homestead declarent while the case at bar are *purchaser*. Will they be injured? They have simply been slaughtered. While R. E. Daggs is sued twice with a double judgment against him, after he paid for the property in full, A. L. Johns is ground down by two judgments against him and his deed set aside, too. They simply burnt him up. Yet the very learned gentleman below *is willing* to say: "The right to a second or supplemental foreclosure of interests without negligence or due diligence on the part of the plaintiff is fully sustained by our courts."

The Statute of Arizona makes specific provisions for bringing in parties, if it is desired to do so, and that while the bill alleges that A. L. Johns placed his deeds upon record two days after he filed his alleged first foreclosure complaint, that then he must have had knowledge, not only and through the tenant, but by the record of the deed of A. L. Johns; and should the appellee have desired desired to make Johns a party he could have done so under Par. 689, Sec. 41, Revised Statutes of Arizona, which is as follows:

"Additional parties may be brought in by process, either by plaintiff or defendant, but upon such terms as the Court may prescribe."

Appellee did not desire then to bring in these people; he was after the mortgagor.

Again, under Sec. 727, Revised Statutes of Arizona Territory, says:

"The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in."

It is thus seen that the appellee negligently and intentionally proceeded to judgment without making A. L. Johns or his tenant a party to his so-called foreclosure suit, and to hide his scheme ———— attacks the appellants and says their conspiracy by secret transfer of possession deceived him. Where is there any room for a court of equity to interfere? Appellee refused there to help himself; refused to bring these parties in his first suit; refuses to enforce his first judgment against the mortgagor, or R. E. Daggs; refuses to try to get possession of the property by writ of assistance; refuses to follow the statute made and provided for him, and which is ample in all such cases. Where is any semblance of a ground for the interference of a court of equity?

If he has any rights he should have, and must have proceeded at the proper time, and in the proper Court, and not having done so, cannot now proceed by a eparsate bill, wherein the case of *Goodenow vs. Ewer, 16 Cal. 461*, the late learned Justice Field of this Court, while he was Chief Justice of the Supreme Court of California, laid down the practice in cases of this kind, and said:

"That no excuse is offered for *neglecting* to apply for relief in the original foreclosure suit."

Boggs vs. Hargrave, 16 Cal. 566.
Kreichbaum vs. Melton, 49 Cal. 50.
Aldrich vs. Stephens, 49 Cal. 676.

We therefore respectfully say, upon these assignments, that the remedy of the appellee was by motion in the original suit, not by separate action attempting to foreclose a mortgage, against the damage arising or purporting to arise from the alleged breach of the contract of *assumption*. This Court will therefore dismiss this action and order restitution as no such an action exists in the Territory of Arizona.

ASSIGNMENT OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON

THE GROUND "THAT NO REASON IS SHOWN FOR A SECOND DECREE; NO REASON BEING SHOWN WHY PLAINTIFF COULD NOT COLLECT HIS ALLEGED DEBT ON HIS FORMER JUDGMENT AGAINST THE MORTGAGOR AND R. E. DAGGS."

In the case of Aldrich vs. Stephens, 49 Cal. 676, it was held in a suit wherein it was sought to obtain a second decree by a second foreclosure precisely as here, and upon a demurrer the Court said:

"There was certainly no necessity for a second decree, the first one not having shown to be in some respects ineffectual to afford the relief claimed by the plaintiff," and sustained the demurrer; and the Court also said in the same action that if relief was to be attained at all it could be reached only in such cases by a motion in the original suit.

Goodenow vs. Ewer, 16 Cal. 461 Supra.

Why is the appellee entitled to maintain this action when he shows by his bill that he is refusing to pursue the mortgagor? Why should a second decree be entered? It is as much the province of a court to suppress unfounded litigation as it is to maintain such as is well grounded. We ask that appellee be put to his first judgment.

ASSIGNMENT OF ERROR NO. 9.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER OF JOHNS AND DAGGS ON THE GROUND "THAT THE MORTGAGOR IS NOT BEFORE THE COURT."

In an action to foreclose a mortgage where it is shown as here that the mortgagor it not before the Court and that he still owns property covered by the mortgage (the city lots) is he not a proper party? Is it bad faith on the part of the appellee, or collusion between the mortgagor and mortgagee? Is the Court doing piecemeal foreclosing? Is is unnecssary to cite authorities to show that a mortgagor is a necessary party to a foreclosure suit, where he owns property covered by the mortgage as here and a foreclosure is sought against it

Daniel vs. Sutton, 20 Fed. Rep. 787.

This rule has been held good, even though the mortgagor's property had been confiscated, and his title divested by proceedings on the part of the government of the United States.

Arcgno vs. Schmidt, 113 U. S. 293.

We claim there is merit in this assignment and the Honorable Court should sustain this contention.

ASSIGNMENT OF ERROR NO. 10.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON THE GROUND "THAT NO SEPARATE ACTION CAN BE MAINTAINED ON A MORTGAGE AND JUDGMENT, IT BEING SHOWN TO HAVE ONCE MERGED IN JUDGMENT."

The doctrine of merger is elementary, and, so far as our research goes, we have not been able to find a respectable authority that holds, that when a cause of action is once merged in judgment the original cause of action retains its vitality, and remains a cause of action, but is merged in and becomes a higher security given by the state, a judgment.

Black on Judgments, Vol. 2, 674.
Freeman on Judgments (2nd Edition), 216.
Van Fleet's Former Judication, p. 95, Sec. 13.

The reason of the doctrine of merger is supported on the ground that the allowance of a new suit is a superfluous and vexatious encouragement to litigation injurious to the defendant and of no benefit to the plaintiff, and that it is a volunteer election by the plaintiff to transform his claim by judicial determination into a different claim, and therefore no second suit can be permitted.

We urge this ground of our contention upon the Honorable Court for consideration upon its merits.

Assignment No. 11 having been disposed of as assignment No. 1 in this brief under the head of misjoinder of causes of action, as well as assignment No. 12—being assignments urging misjoinder of causes as well as of parties, we ask attention to.

ASSIGNMENT OF ERROR NO. 13.

APPELLANTS CALL ATTENTION NEXT TO THE DEFECT IN THE COMPLAINT AS IT IS POINTED OUT BY THE APPELLANT, R. E. DAGGS, IN HIS THIRTEENTH ASSIGNMENT OF ERROR, CHARGED IN HIS SPECIAL DEMURRER, THAT THE COURT BELOW ERRED IN OVERRULING HIS SPECIAL DEMURRER ON THE GROUND

"THAT BECAUSE THE PLAINTIFF'S COMPLAINT SHOWS ON ITS FACE THAT HE ALREADY HAS JUDGMENT AGAINST THE APPELLANT, R. E. DAGGS, FOR THE SAME ALLEGED MORTGAGE THAT FORMS THE FOUNDATION OF THIS ACTION, IN THIS SUIT, IT IS THEREFORE RES JUDICATA AS TO HIM."

This defect appearing on the face of the complaint advantage may be taken of it by demurrer and the Court below should have sustained this demurrer, for the reason that if the appellee has already judgment against this appellant by virtue of the principles of law he is stopped from vexing and harrassing again this appellant upon the same matter; and when this appears on the face of his bill, and objection taken to it, this appellee is entitled to have his demurrer sustained.

Oregonion Railroad Co. vs. Oregon R. Etc. Co., 10th Sawy. Page 465.

1 Chitty Pl. (16th American Edition) Page 629.

Veale vs. Warner, 1 Saund. 329.

Hustler vs. Hayes, 3 Cal. 302.

Smith vs. Whittaker, 11 Ill. 418.

German Mut. Life Ins. Co. vs. Grim, 33 Ind. 249.

Crawford vs. Nolan, 70 Ia. 97.

Bartholemew vs. Candy, 14 Pick. (Mass.) 167.

ASSIGNMENT OF ERROR NO. 14.

THE COURT BELOW ERRED IN OVERRULING THE SPECIAL DEMURRERS OF A. L. JOHNS AND R. E. DAGGS ON THE GROUND "THAT BECAUSE THE APPELLEE HAS MADE A MISTAKE OF LAW, AND RELIED UPON HIS FIRST AND FORMER DECREE, THE COURT WAS THEREFORE WITHOUT JURISDICTION TO GRANT RELIEF IN A SECOND ACTION."

We beg to assert that we consider this objection in this assignment fatal to the contentions and right of the appellee to prosecute a second action, having shown on the face of his bill thart he deliberately brought his first action and relied upon his decree, and it is not alleged or shown that his decree is ineffectual in any manner; and he also alleges that

he filed a Lis Pendens one day after his bill was filed, by which we assume he sought to cut off all right of appellant, A. L. Johns.

The question, however, is: having deliberated his action, with full notice of the right of A. L. Johns, by and through his tenant being in open and notorious possession of the property and thereby notice of the rights of A. L. Johns, and also by the filing of the deed of A. L. Johns two days after his first action was commenced, and also by his allegation that on the 28th day of April, 1894, W. A. Daggs, the tenant then claimed and asserted to him that he was not the tenant of R. E. Daggs but of A. L. Johns, with this knowledge and facts before him, he proceeded deliberately to judgment, without making Johns or his tenant a party to the action; and in such a case, if he has made any mistake wahtever, it is a mistake of law for that appellee had full knowledge of all the facts in existence and so says by his bill and a Court of Equity has no power or jurisdiction to grant relief.

Under the statute and code of Arizona Territory the lien of the mortgage is a mere cumulative right to the right to issue execution upon the personal judgment upon the notes, which personal judgment is always in every case, taken in the first instance which becomes a judgment lien on all the property of the judgment.

Rev. Stat. Ariz. Ter., Par. 2253 is as follows, to-wit:

"When any judgment has been recorded and indexed, as provided in the preceding sections, it shall from the date of such record and index operate as a lien upon all the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county."

See Revised Statutes of Arizona 797.

"Judgments for the foreclosures of mortgages and other liens shall be that the ***plaintiff recover his debt***, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and * * * that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant as in case of ordinary execution."

It is seen that a personal judgment is entered first under this statute where the payee of the notes chooses even to foreclose the mortgage lien.

The payee of the notes can (and it is more often done) take a plain judgment on the notes and then take a general execution against the payor and reach personal as well as real property. And the mortgage lien is a mere cumulative lien to his judgment lien, which judgment lien covers all the debtor's property, whereas the mortgage lien covers only a specific portion thereof.

A mortgage is a mere lien in Arizona, whatever its terms.

Revised Statutes of Arizona, 3155. (Same hereinbefore quoted.)

That the Court has no power or jurisdiction to relieve the plaintiff here from his deliberate mistake of law.

Goodenow vs. Ewer, 16 Cal. 461, where it is said: Such a mistake is a mistake of law.

"As a general rule, the purchaser will be released and a resale ordered or such new and additional proceedings as may obviate the objection arising from those originally taken when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, there would seem to be no just reason why the ordinary rule as to mistakes of law should not apply. From the consequences of this class of mistakes, courts of equity seldom relieve, as we have already stated. Indeed the weight of authority in the United States is that the mistake, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence, constitutes no ground for relief.

"It may be safely affirmed (says Mr. Justice Story) upon the highest authority, as a well established doctrine that a naked mistake of law, unattended with any special circumstances, (such as misplaced confidence, misrepresentation or undue influence) will furnish no ground for the interposition of a Court of Equity; and the present disposition of Courts of Equity is to narrow rather than to enlarge the operation of exceptions."

Storey's Equity, Sec. 138.

Snell vs. Atlondice F. & M. Ins. Co. 98 U. S. 85.

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Bank of the U. S. vs. Daniel 12 Pet. 618.

Where, in the case here cited, this Court laid down the doctrine:

"That a Court of equity *cannot* grant relief against a mistake of law."

And as was said also in Goodenow vs. Ewer, supra:

"No excuse is offered for neglecting to apply for relief in the original foreclosure suit."

"Besides these considerations the present action is not brought for relief from the sale, but is brought for another purpose, and Downer (the mortgagor as here John S. Armstrong the mortgagor) is not a party before the court."

In Lynch vs. Richmond, 2 John N. Y. 60, Chancellor kent said:

"The Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of the law. Every man is to be charged at his peril ,with a full knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

Crozier vs. Acre 7 Paige, N. Y. 137-143.
Zellman vs. More, 21 Grat. Va. 113.

For that it is a maxim "that ignorance of the law excuses no man."

It is charged in the plaintiff's bill that the appellant, A. L. Johns, withheld his deed from the record until two days after he had brought his foreclosure suit, and then placed the deed upon record, which deed is of date March 17th, 1894, and the suit was brought on the 26th of April, 1894; and appellant, Johns" deed was placed on record April 28th, 1894; while, during all this time the tenant of A. L. Johns (W. A. Daggs) was living in open and notorious possession of the property, and W. A. Daggs, the tenant, claimed and asserted on the 28th day of April, 1894, to the appellee, that he was Johns' tenant, appellee being told this to his face, and Johns' deed being on record, why should he not know? Still, the appellee charges that he was the victim of fraud, because Johns withheld the deed from record; and that he proceeded to judgment, sale, etc., and that that was a sufficient excuse for him not making Johns a party. He knew of it all. He could have brought them in. He did not do it. Why? He had nothing to obtain but his decree. He must have relied on that, and his lis pendeus against John

S. Armstrong and R. E. Daggs. He was not deceived. He could not have been deceived. He knew personally, actually and constructively, all there was or is to know at the time he brought his first bill. The truth is, he relied upon his foreclosure suit, and, as we have shown, he simply made a mistake of law.

As to him being a victim of fraud by the withholding of the deed by Johns, or any one else, such an act is not a fraud, and instead of it being a fraud it is an attempt by the plaintiff to plead his own subterfuge to shield his scheme, and to reap from his own wrong.

In Boggs vs. Hargrave, 16 Cal. 599, reading page 565, where the question came up as to the withholding of a deed precisely as is charged by the appellee, and the late Justice Field of this Court, while Chief Justice of the Supreme Court of California, in rendering that opinion, said:

"The plaintiff was aware at the time of his bid, of the existence of the deeds to Bristol. It was the subject of *conversation between him and the attorney of the mortgagee, previous to the sale. It was executed before the commencement of the foreclosure suit, and was on record prior to the sale. There was no fraudulent misrepresentation to induce the purchase. The facts were all within his knowledge, or might have been. The record would have informed him of the date of the execution of the deed, and his neglect to avail himself of this accessible means of information takes from his claim all title to favorable consideration on that ground.* It is evident that the plaintiff did not attach any importance to the existence of the deed, and his bid was made upon a mistake of law as to the effect of the decree; and the real question presented is: Whether for money paid, under these circumstances, the present action will lie? We are clear that it will not."

In the case at bar appellee pleads that two days after he filed his first action the tenant claimed and asserted that he was the tenant of A. L. Johns and not the tenant of R. E. Daggs. The deed of A. L. Johns was also on record, still, here, he proceeded on deliberately to judgment, and relied solely upon his decree, and now springs up without even trying to exhaust the mortgagor and claimed he was misled by the fraud of those who told him face to face of the very thing he complains.

Reverting again to the opinion below on the point here under discussion they admit that the "*authorities quoted* fully sustain the doctrine laid down by Justice Storey, that "a naked mistake of law, etc., will not furnish grounds for in-

terference of equity and that the tendency is to enlarge rather than enlarge the exception."

They then say: "This doctrine, however, refers to cases where a mistake of law has occurred, *where the facts are known* and no fraud or deceit has been practiced, whereas in this instance the relief is asked on the ground of mistake in fact as well as law and for which mistake the fraud and deceit of the defendants are alleged in the pleadings to be responsible."

Apparently as an apology for the above statement the learned writer in a doubtful manner says: "In the case at bar *if any mistake of law was made*, it was certainly induced by the fraudulent withholding from the record of the deed from Daggs to Johns *until after the records were searched*, the foreclosure suit begun, and the lis pendens had been filed."

The most scrutinizing search of this entire record will fail to disclose in any manner, shape or form that this appellee ever searched any records in this case and we cannot account for such volunteer statements on the part of the court below; again, at the same time, the learned writer below forgot that in his garbilation of facts from the appellee's bill he had said in the first of his statement, speaking of the time of filing of appellee's bill—"At this time the defendant, W. A. Daggs, was in *possession* of the premises *supposedly* as the tenant of R. E. Daggs."

W. A. Daggs, the tenant, is then guilty of a fraudulent secret change of possession because he was on the premises open and notorious, but was not there *supposedly* as the tenant of R. E. Daggs. He was not made a party to the first suit.

The learned ecclesiast also forgot that appellee's bill makes this statement, to-wit:

"Plaintiff further shows that W. A. Daggs, who had heretofore been in possession of said premises as tenant of R. E. Daggs, in pursuance of said conspiracy as aforesaid, *at or about the time of recording of said deed to said Johns, to-wit: on the 28th day of April, 1894, CLAIMED and ASSERTED to have abandoned* said premises and property as the the tenant of said R. E. Daggs on or about the 1st day of April, 1894, and thereupon to have become the tenant of A. L. Johns."

This clause of appellee bill shows that he knew that *on or about* the 28th day of April, 1894, W. A. Daggs claimed and asserted himself to be the tenant of A. L. Johns. He

does not allege that he is informed that W. A. Daggs, the tenant, claimed and asserted, but alleges positively that he did. Now the very Honorable Court below has the coolness to say the facts were not known and that fraud and deceit were practiced, and injects into this case that the records were searched.

The appellee alleges that he did know the facts and the court below says he didn't know the facts. This paradoxical position between the court and appellee is strengthened and climaxes in the further statement furnished by the court that the *records were searched* by appellee.

The allegation of appellee shows that he did not search the records, but filed his suit on April 26th, 1894, his lis pendens April 27th, 1894, and on or about April 28th, 1894, the day Johns filed his deed, did search W. A. Daggs, who claimed and asserted to appellee's face that he was not R. E. Daggs' tenant, nor hadn't been since April 1st, 1894, but was tenant of A. L. Johns. Appellee further alleges that these parties should have come to him and give him notice. They didn't know he was going to sue. The note fell due on Saturday and he sued on Monday. Appellee lives in Chicago.

This covers the dispute on this point that appellee deliberately went to judgment and foreclosure in his first suit with a full knowledge of all the facts by both verbal and record notice of the rights of A. L. Johns and W. A. Daggs. He cared nothing for them. His decree was what he must have relied upon. What else was he relying on, or going to rely on? This being true leaves nothing before this court but a bald mistake of law made by appellee as to these appellants. The court has no power to reach him. It has no jurisdiction over these appellant's. It must leave appellee where he started, and revert him to his first judgments, which are ample, and which he is refusing to follow.

The Honorable Court can neither help the appellee nor injure him by sustaining this ground of demurrer. He can get his debt, if he has any, from the judgments he has, and the appellants will thereby be saved from the havoc and slaughter that this record shows they have and will sustain if this judgment is allowed to stand.

Again, appellants, disposing first of the special demurrers, now call attention to the general demurrers of W. A. Daggs and A. J. Daggs, which struck at the so-called action of conspiracy to cheat and defraud by general demurrer, and the demurrer being overruled by court of first instance was assigned in court below as error and held immaterial or un-

important, is reassigned here for consideration. The point here goes to the substance of the cause of action for conspiracy and can be raised at any time, even in the court of last resort, and appellants R. E. Daggs and A. L. Johns join with their co-appellants, and all assign.

ASSIGNMENT OF ERROR NO. 15 A.

"THAT THE COURT BELOW ERRED IN OVERRULING THE GENERAL DEMURRER OF APPELLANTS ON THE GROUND THAT THE BILL DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR CONSPIRACY TO CHEAT AND DEFRAUD, AS AGAINST ALL OR ANY OF THEM."

It is alleged in the bill "that about the time of the coming due of appellee debt R. E. Daggs and A. J. Daggs --A. J. Daggs acting as agent of R. E. Daggs—conspiring together to *hinder, delay and obstruct* plaintiff in the collection of his said mortgage debt procured and caused a deed of conveyance of said property to *and the whole* thereof (the city lots were never conveyed) to be executed by said R. E. Daggs, purporting to convey said property and the whole thereof to the defendant A. L. Johns, who was alleged to reside at the city of Chicago in the state of Illinois, the said A. J. Daggs acting as the agent of said R. E. Daggs in making such pretended transfer; "That said deed of conveyance was dated on the 17th day of March, 1894, but the same was withheld from record until the 28th day of April, 1894, after the summons in said action aforesaid had been served upon said R. E. Daggs and two days after said *lis pendens* had been filed and plaintiff shows that *he is informed* and verily believes that the same was during all said time in the control of said R. E. Daggs and his agent, A. J. Daggs, and was withheld from the record until after said lis pendens was filed and said suit was commenced for the purpose of humbug and delaying this plaintiff in the collection of his said mortgage debt, and to cheat and defraud this plaintiff."

"That in and by said deed to A. L. Johns aforesaid, said A. L. Johns expressly agreed and bound himself to pay plaintiff's mortgage debt as aforesaid, but said Johns allowed said deed to be withheld from record as aforesaid until after said action was commenced and neither paid said debt or any interest thereon or made any inquiry of plaintiff in regard thereto, although he well knew said debt was due and payable on the 24th day of April, 1894, and plaintiff alleges on

information and belief that said Johns paid nothing whatsoever for said conveyance and that R. E. Daggs remained in control of and the actual owner of said premises by secret trust notwithstanding said conveyance."

"Plaintiff further shows that the said W. A. Daggs, who had heretofore been in possession of said premises as tenant of said R. E. Daggs in pursuance of said conspiracy as aforesaid at or about the time of the recording of said deed to A. L. Johns, to-wit: on the 28th day of April, 1894, claimed and aserted to have abandoned said premises and property as the tenant of R. E. Daggs and on or about the first day of April, 1894, and thereupon to have become the tenant of said A. L. Johns, and to have thereupon taken possession thereof for said Johns and plaintiff shows that such abandonment and releasing of said property was done secretly and without any notice whatsoever to this plaintiff and with intent to deceive this plaintiff into the belief that said R. E. Daggs was still the owner of said premises and possessed thereof by said W. A. Daggs as his tenant and plaintiff on account of said secret transfer of possession if any was made was so deceived as above alleged, said defendant intended him to be, and the said action therefore proceeded to judgment without joining or making said Johns or W. A. Daggs defendants therein and plaintiff had no knowledge or information whatsoever when he commenced his said action and filed his notice of lis pendens as aforesaid, that any other person than R. E. Daggs had any interest in or claim whatsoever to said premises."

He then says on the 15th day of December, 1894, he went to where W. A. Daggs was living on the land and demanded of him that he give him, appellee, possession of the land, but he was refused, W. A. Daggs again telling him he was Johns' tenant, and has not yet got possession, but has been excluded to his damages in the sum of one thousand dollars. Now, on "information and belief," he alleges that said holding of said W. A. Daggs is in trust and for the benefit of said R. E. Daggs by and through the acts, procurement, aid, contrivance of said R. E. Daggs and said A. J. Daggs, who is as aforesaid the agent and attorney of said A. L. Johns." His prayer is—wherefore plaintiff prays judgment "against R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns for the sum of 1000 dollars, his additional damages by reason of the premises stated as aforesaid, beside the costs of this action." He then asks a foreclosure of his mortgage and other things having no reference to the conspiracy, and the bill closes, "and that he may have such other and further relief as the circumstances of the case re-

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quire and equity and justice demand." This is the bill that set A. L. Johns' deed aside on the ground of fraud.

The statute of Arizona Territory having reference to fraudulent conveyances, Rev. Stat. of Arizona, Par. 2037, is as folows, to-wit:

"The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

The intent is the gist of the action, and that intent is one of fact and not of law, no conveyance can be set aside on the ground solely of no consideration.

Rev. Stat. of A. T., 2037.

"Fraud (says Marshall, C. J.) consists in the intention and that intention is a fact which ought to have been avered, for it is the gist of the plea and would have been trovers-able."

Moss vs. Riddle, 5 Crouch (U. S.) 351.

A fraudulent intent imports wrong and injury, hence injury must be shown. The words cheating and defrauding, or any other multiplicity of similar epithets do not import anything, and it becomes necessary for the Court to see that the intended means are in fact illegal, some dishonest purpose shown.

U. S. vs. Cruikshank, 92 U. S. 558.

The bill here alleges that R. E. Daggs and A. J. Daggs acting as his agent caused a deed to be made to A. L. Johns in which the whole of the mortgaged property was conveyed to A. L. Johns (not the whole, only part the city lots out) of Chicago, and his deed was withheld from the record until two days after his first suit and *lispendens* was filed and then it was put upon the record. Then he sues Johns on a contract in this deed of an assumption and then says "on information and belief that said Johns paid nothing whatever for said conveyance."

Then he says W. A. Daggs claimed and asserted that on or about the 28th day of April, 1894, about two days after he filed his suit, that he was not R. E. Daggs' tenant, but A. L. Johns' tenant. W. A. Daggs had thereby made a secret transfer of possession for the reason that W. A. Daggs did not take the trouble to hunt appelee and tell him about

it when appellee lived in Chicago, accordng to this bill, and Daggs in Arizona. The bill also alleges that he has a judgment against John S. Armstrong, but it nowhere says he could not get his claim (if he has any) off of him or that he is insolvent.

The fact that a deed is made is an every-day transaction and in and of itself is not a fraud. That it was not put on the record for 30 days is not a fraud:t hat it happened to reach the record two days after the appellee filed his bill is not a fraud either. Johns was in possession by W. A. Daggs. Was Daggs a party to his first suit? No. Yet appelee alleges he knew he was on the farm, but says he thought he was R. E. Daggs' tenant. Still he didn't make him party. Two days after suit appellee was told by Daggs, so he alleges, Daggs claimed, and asserted, he was Johns' tenant and not R. E. Daggs' tenant, and did he make them party? No. Whose fault is it that he did not make them party? It was appellee's. Appellee claims to be a mortgage, does it lay in his mouth to say that because I have a mortgage the wheels of trade must thereby stop or I will set your deeds aside? Appellee knew this sale had been made before and after he brought his suit. What right had a mortgagee to attack one who buys the mortgage property or a part of it? He has a mere lien in this territory. How could it effect him if there was a thousand sales made? He would and could not be even inconvenienced. If he is compelled to go to court to foreclose(that's not delay to him. He can't complain.

His bill for conspiracy is a sham excuse for not bringing in parties whom he aleges told him to his face all about their titles. At the time he filed his first suit he knew as much about the facts of this case as he did fifteen months after when he filed his second suit. He says he did not get possession when he asked his tenant for it to his damage in 1,000 dolars, but does not say he ever issued a writ of assistance. We have shown he could have brought in parties any time after suit commenced by motion. Then he says in his prayer he wants a 1,000 dollars additional damages against all by reason of the premises. Yet he set A. L. Johns' deed aside on the ground of fraud under this bill.

He alleged on information and belief that Johns paid nothing for his conveyance. Is this a sufficient allegation to set a deed aside for fraud? Although the deed was upon record when this suit was brought, nothing is said regarding its terms, except upon information and belief it was without consideration, and to sue Johns on a contract in the

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deed, thus electing to waive any wrong done by the deed. The truth is the mortgagor and mortgagee have colluded together and seek to pretend the claim not paid. This is the kind of a case where if the action of a mortgagee against a grantee of the mortgagor can obtain without suing the mortgagor that fraud can happen.

Now can appellee under these facts and law be heard to say he is stating a cause of action for conspiracy? None of these acts are in and of themselves fraudulent. They were not concealed from his view. He knew them fifteen months before he sued here; knew as well when he first sued as when he last sued. He was not delayed. How can a man have an intent to defraud and at the same time buy subject to a claim, and, moreover, agree to pay it, as appellee charges? Where is his intent to defraud? These charges are bogus charges built up for the purpose of attracting attention from the real purpose of the appellee. They have no substance. A mortgagee has no concern about such frauds, as this kind of frauds are committed every day by the million. If he gets more security, as he claims, why is it not a good thing to have it sold and resold? Appellee is in the ridiculous attitude of taking benefit from the transaction he pretends is a fraud. He affirms it by benefiting from it and then seeks to get more benefit from it by howling fraud against it, and setting Johns' deed aside.

We think we should not follow this point further. It is not propriety, and dismiss it, believing the demurrers of appellees should prevail.

It may be urged that because some of the appellants are relatives and that indicates fraud. That hallucination has long since been exploded by this Court. It will not cast suspicion.

Callieb vs. Thatcher, 151 U. S. 271.

Fraud alleged upon information and belief not sufficient.

Seidman vs. Geib, 16 Daly (N. Y.) 434.

Phillips vs. Schoaly, 271, N. J. E. 410.

The bill does not present sufficient grounds of equity jurisdiction. It is vicious.

Van Weil vs. Winston, 115 U. S. 228.

Injury must be shown. He says he has benefited by getting more security, and sues upon the contract. These positions are diametrically opposite. If he was benefited

by the contract he sued on he could not be injured by the deed.

Finn vs. Grau, 17 Fed. Rep. 407.

Where the federal court said: "The rule in equity is that it is not sufficient to charge fraud simply, but you must charge also some injury as the result of the fraud."

Appellee claims R. E. Daggs and A. L. Johns creditors, and claims the right to sue them upon contracts made for his benefit, while on the other hand sets their deeds aside and renders them unable to pay him or redeem from the sale. This will not do. It is mere sham and a subterfuge. No cause is stated for fraud and the Honorable Court will we believe, so declare.

At this juncture appellants call the Court's attention to the fact upon the face of this bill. That appellee elected his remedy and waived his right to say there is fraud or declare upon it. For that he first sued appellants on thes o-called contracts of assumption and thereby estopped himself to question the good faith of those who made them. Appellee cannot be heard to blow hot and cold at the same time. He cannot be heard to say these persons made these contracts for my benefit, and I elect to sue on them and take whatever benefit they afford and at the same time say these contracts were fraudulent, and set their deeds aside on that ground. This is a diametrically opposite and inconsistent position.

Yet this is the game played at here by the appellee. He sues on the contracts of assumption in the deed and takes a personal judgment against R. E. Daggs, A. L. Johns and sets Johns' deed aside at the same time.

In the Court below the learned Court instead of following the ruling of the Court of first instance, and allowing the appelee to recover on both his opposing positions, elected appellee's remedy for him and selected the suit setting the deed aside as against Johns', but struck down his cause and recovery on the first suit on the contract of assumption. They went further and declared that appeelee had searched the records before his first suit when appelee does not claim nor prove this for himself.

The court below had no power or authority to elect the remedy for a party. The party alone can do that. "Election goes not to the form, but to the essence of the remedy. It applies to the case where the law (not the practice) supplies to a party in vindication of a right two or more modes of procedure predicted upon conflicting theories. The function of the code is dormant until the party has made his

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election." Neither does the Court have anything to do with the case until the party has selected his remedy, and it is not in the province of the Court to elect the remedy for the plaintiff after the plaintiff has elected it for himself, not before.

"It may, therefore, be stated approximately, if not substantially true, that subject to the exceptions hereafter stated, the first pronounced act of election is final and imperative."

7 Am. and Eng. Ency. of Plead. and Prac. 364.

After suing on the alleged contracts of assumption as against R. E. Daggs and A. L. Johns, appellee is estopped and barred to assert by his own acts to say there is any fraud. His bill shows he knew all the facts at the time he brought it. That he sued on the contract of assumption and afterward in the same bill sues for fraud.

"No suitor is allowed to invoke the aid of the Courts upon contradictory principles of redress upon one and the same line of facts."

7 Am. and Eng. Ency. of P. and P. 363 and cases cited.

When he makes his first election his own act denies him the right to another cause of action. His election is conclusive and irrevocable. In Coulban vs. Thompson, 111 Mass 170-272, the Court said: "The defense of waiver by election is founded on an affirmance and the other upon the disaffirmance of a voidable contract sale of property. In such case, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act; if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale or to receive one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

The supreme Court of the United States laid down the rule on this point, and said: "The rule established by these cases is that any decisive act by a party, with full knowledge of all his right and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

Robb vs. Voss, 155 U. S. 13.

Appellee here knew all the facts as he shows by his bill, then sued upon the alleged assumption of the contract said

to be incorporated in the deed and thus affirmed the sale of the property and waived his right to say there was any wrong or fraud, and there was none. And then reverses in the same bill sues on a charge of conspiracy to defraud arising from the same deed a contract and seeks not only to get a personal judgment against the parties, but a judgment destroying the contract upon which he first sues.

This defect apearing on the face of the bill, appellant's contention is that it is reachable by general demurrer, and ask the Honorable Court to so hold.

ASSIGNMENT OF ERROR NO. 15.

THE COURT FURTHER ERRED IN AFFIRMING THE JUDGMENT BECAUSE THE COURT ERRED IN OVERRULING THE MOTION OF APPELANTS FOR A CHANGE OF VENUE ON THE GROUNDS THAT THE TRIAL JUDGE WAS SO BIASED AND PREJUDICED AGAINST THEM THAT THEY COULD NOT HAVE A FAIR AND IMPARTIAL TRIAL BEFORE HIM."

The motion for a change of venue in this action ssould have been sustained.

The affidavit fully complies with the statute.

It is leveled at the bias and prejudice of the judge who tried the case. The section of the Arizona law under which this application was made are Acts of 1891, Bill No. 41, page 59, is as follows:

"Sec. 1. Whenever either party to a civil action in any District Court of the Territory shall make and file an affidavit in the case, stating one or more of the following causes:

"Subdivision 3. That the affiant has cause to believe, and does believe that on account of the bias or prejudice or interest of said judge, he cannot obtain a fair nor impartial trial."

This language is the third clause under section 1 of the Act authorizing the motion for a change of venue.

Omitting title of the Court, the language of the affidavit for a change of venue is as follows:

"A. L. Johns, A. J. Daggs, R. E. Daggs and W. A. Daggs, defendants, being first duly sworn, says that they are defendants in the above entitled cause and that

they have cause to believe and do believe that Hon. A. C. Baker, judge of the above court, is biased and prejudicial against them so that they cannot have or obtain a fair or an impartial trial before him in this cause," and prayed the venue changed to some other district where such cause did not exist.

This statute came from Missouri, where it is so held.

In Re. Est. Whitman, 1st South Western, 125, Guinidick vs. Crum, 32 Pac. 800.

81 Mo. 93 ——— 57 Mo. 88.

89 Mo. 58 ——— 79 Mo. 198.

Apellants contend there is substance in this contention and that if the Honorable Court does not strike it down upon the grounds of demurrer it should be reversed upon this ground and a change of venue orderd.

"Section. 2. When a change of venue is directed for any of the causes mentioned in section 1 of this Act the Court or Judge shall send the cause to the most convenient county in the adjoining district, unless the parties in said action shall agree to some other county, in which event the cause shall be sent to the county so agreed upon by the parties, and the clerk of the court, in which the action is pending, shall forthwith transmit the papers and transcript of the proceedings in the case to the clerk of the court to which the venue is changed."

This affidavit complied with the statute. There is no better evidence of the bias and prejudice of the judge who tried this case than a reference to the judgment he rendered. It gave judgment against R. E. Daggs on the first judgment for $7,190.11, and on the second for $8,541.13 and foreclosed against him twice. It gave two judgments against Johns on his so-called assumption, and set his deed aside at the same time. It adjudged the whole job lot guilty of conspiracy, and the only leniency shown defendants was that he paroled them upon their own recognizance. When an affidavit complies with the statute it sweeps the jurisdiction of the judge away and he has no further jurisdiction than to grant the change of venue.

ASSIGNMENT OF ERROR NO. 16.

"THE COURT ERRED IN OVERRULING THE MOTION OF APPELLANTS FOR A CONTINUANCE, ON THE GROUNDS THAT A MATERIAL WITNESS, JOHN S. ARMSTRONG, THE MORTGAGOR, WAS

ABSENT, AND THAT HE WOULD TESTIFY THAT THE DEMAND SUED ON IN THIS CASE HAD BEEN FULLY PAID AND DISCHARGED."

It is reversible error to deny a continuance where the application complies with the requirements of the law and is not made for delay; and the evidence is material and diligence is shown.

The application was in due form (see R. R. 10) and made under Sec. 752 of the Revised Statutes of Arizona, which is as follows:

"On any application for continuance, if the ground for such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence and the cause of failure, if known, that this testimony canot be obtained from any other source; and if it be for the absence of a witness he shall state the name and the residence of the witness, and what he expects to prove by him; and he shall also state that the continuance is not sought for delay only, but that justice may be done."

This Statute was taken from the Statutes of Texas, wherein Burley vs. the State, 14 S. W., 1008, it is held that the Court has no discretion but to grant the application when the application is in due form.

Am. and Eng. Ency. P. and Prac., Vol. IV, p. 848.

Armstrong's cohort purchased at the sale and his testimony could not be had. We submit it was error to overrule motion for continuance.

ASSIGNMENT OF ERROR NO. 17.

"THE COURT FURTHER ERRED IN OVERRULING THE MOTION OF THE APPELLANTS FOR JUDGMENT AT THE CLOSE OF THE EVIDENCE OF THE APPELLEE, ON THE GROUND 'THAT THE EVIDENCE INTRODUCED BY THE PLAINTIFF IS NOT SUFFICIENT TO WARRANT THE RELIEF PRAYED FOR,' AND ON THE FURTHER GROUND 'THAT THERE IS NO EVIDENCE SUSTAINING THE ALLEGATION IN THE COMPLAINT,' AND THE JUDGMENT SHOULD HAVE BEEN IN FAVOR OF APPELLANTS AND AGAINST THE APPELLEE."

This motion being in the nature of a demurrer to the evidence entitles applicants to a review of the evidence, which will clearly show that the application for judgment was proper; the legal sufficiency of evidence is a question for the Court; the rule announced by this Court in the case of Chandler vs. Von Roeder, 24 How (U. S.) 227, is:

"When, assuming that all the testimony adduced by the one or the other party is true, it does not support his issue, it is the duty of the judge to declare this clearly and directly."

A demurrer admits only such facts as tend to prove, which is more than a scintilla and such inferences which overthrow either presumptions oy law, or inferences of fact are not indulged. No forced or arbitrary inferences are admitted.

Pawling vs. U. S., 4 Crouch (U. S.) 219.

The judgment roll in case No. 1854, James Wilson vs. John S. Armstrong and R. E. Daggs, marked Pltfs. Ex. A, was introduced in evidence, and it contained complaint founded on the two notes sued on herein; also ask foreclosure on the same property except the "city lots," and has one of the same parties, to-wit, R. E. Daggs. It also contained the summons and judgment and the order of sale, directed to the sheriff of Maricopa County of the property described in the complaint, and the sheriff's return, which return charges that in pursuance to the order of sale he advertised the property described in the complaint, by the notices provided by the Statutes by posting hand-bills and by publishing once a week for twenty-one days in the Arizona Gazette, a newspaper printed and published in the County of Maricopa, and further said: "That on Wednesday, the 6th day of June, 1894, the day on which the said real property was so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and offered said real property for sale at public auction to the highest bidder according to law; and sold the same to James Wilson for the sum of Seven Thousand Four Hundred and Forty-four Dollars ($7,444), he being the highest and best bidder, and said sum being the highest amount bid for the said property, and which amount I actually have received; and that I delivered to said purchaser a certificate of said sale and filed a duplicate thereof in the office of the County Recorder of the said Maricopa County, and I further certify that I deducted from the said sum of Seven Thousand Fonr Hundred and Forty-four dollars ($7,444) my fees, commissions and expenses, amounting to the sum of Two Hundred and Fifty-three Dollars and 90-100ths ($253.90), leaving a net balance of $7,190.10,

which net balance I paid over to the plaintiff's attorneys, whose receipt thereof is hereto attached; and I herewith return this writ partially satisfied in the sum of $7,190.10, there still remaining due and unpaid on said judgment interests and costs in the sum of $9.50.

Dated June the 6th, 1894.

(Signed) J. K. MURPHY,

By FRANK M. KING, Deputy Sheriff. Sheriff.

This instrument is headed "Office of the Sheriff of Maricopa County. I, J. K. uMrphy, do hereby certify," etc.

The sheriff's certificate is in this record, and attached to it will be found the following receipt, which is therein mentioned:

($7,190.10) Phoenix, A. T., June 6th, 1894.

Received from J. K. Murphy, sheriff of Maricopa County, Arizona, the sum of $7,190.10, amount of sale in the case of J. E. Wilson vs. John S. Armstrong, after deducting sheriff's fees, commissions and costs.

(Signed) THOS. ARMSTRONG, JR.,

Attorney for James Wilson, Plaintiff.

Filed June 22nd, 1894.

Says Mr. Black on judgment: "From the earliest times the written memorials of courts have been held to impart the most absolute and 'incontestable verity,' 'and are evidence of the highest nature.' "

Black on Judgments, Volume I, Par. 276.

The appelle thus with conclusive evidence proved that he had no demand against any one. That it was paid. The return also shows that the sheriff paid this money over to the counsel of appellee, who in turn gave his receipt for the same. Appelele then proved himself out of Court by the most solemn evidence, which under no circumstances can be disputed.

Again the plaintiff introduced in evidence a warranty deed, marked Pltfs. Ex. B, executed by John S. Armstrong to R. E. Daggs, for the purpose of showing that the notes and mortgage set out in the complaint had been assigned by R. E. Daggs. Assumption clause in same is as follows:

"The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of Two Thousand Three Hundred and

Fifty Dollars ($3,250), executed by John S. Armstrong on or about April, the 18th, 1893, to James Wilson and Desda A. Wilson, his wife; and secured by mortgage of the same date as said notes on the land hereby conveyed."

This above clause in deed is every scintilla of evidence that is in this record relied on by appellee to prove the liability of R. E. Daggs on the two notes, and mortgage set out in the complaint.

A comparative analysis of the above clause taken from the warranty deed from John S. Armstrong to R. E. Daggs does not tend to prove the allegation above set forth for the following reasons:

First: It contradicts the warranty deed. In this the deed shows the full consideration of the property paid cash in hand and the grantor covenants to warrant and defend the title to the property against all claims whatsoever.

Second: Two notes alone are assumed.

Third: The dates of the notes set out in the appellee bill is on April 24th, 1893, while those mentioned in the assumption clause is of date April 18th, 1893.

Fourth: The payee of the notes set out in the appellee pellee complaint is James Wilson, while the payees of the notes in the clause of assumption are James Wilson and Desda A. Wilson.

Fifth. No mortgage whatever is assumed; merely mentioned ———.

Sixth: The land on which the mortgage alleged to be assumed is suposed to rest is not the same land upon which the mortgage securing the notes sued on is alleged to rest, the difference being a large number of city lots in the town of Tempe worth $2,500.

Seventh: That while the mortgage sought to be followed covers a water right worth $3,500, it also covers two ditch rights, McKinney and Kirkland, worth $1,000, while the mortgage here mentioned covers only land.

Eighth: The notes sued on bear 8 per cent interest, while those assumed draw only 7 per cent after maturing.

Ninth: The dates of the mortgages are different.

The only points of similarity in the instruments set up by the assumption clause in the deed are:

First: The amounts of the notes are the same.

Second: The maker of the one set of notes has the same name as the maker of the other set, and as many people have the same name no presumption can be indulged; that where the same proper name appears in two different papers that they refer to one and the same person. The burden is on the plaintiff to make his case and he must show that the persons referred to are one and the same in the instruments mentioned, for it is a fact. There are hundreds of James Wilsons, John Smiths, William Jones and John S. Armstrongs. The country is full of them. Identity of name does not prove identity of person. Hence, the only actual similarity is the amount, one point of similarity and 8 of dissimilarity. Whether this could be called a scintilla jot or a title we are unable to say, but surely no lawyer will urge that it in any manner tends to prove the liability of R. E. Daggs on the notes and mortgage in suit.

The plaintiff in every case should do more than merely read his writ and take his judgment.

In this evidence there are eight points against the proof of assumption, and one (the amount) in its favor.

There was also a warranty deed introduced in evidence from R. E. Daggs to A. L. Johns, for the purpose of proving the assumption of the note and mortgage sued on. Assumption clause in same is as follows:

"The said A. L. Johns buys the herein described lands with full knowledge of the now existing James Wilson and Desda A. Wilson mortgage of Six Thousand Five Hundred Dollars ($6,500), and hereby assumes and agrees to pay the same."

This phrase just quoted is every scintilla of evidence that appears in this record offered, to prove that A. L. Johns assumed and agreed to pay the notes and mortgage set forth in the plaintiff's complaint.

A comparative analysis of the clause offered to prove the assumption of A. L. Johns of the notes and mortgage sued on will show:

First: That it disputes the consideration of the warranty deed and the warranting clause of the deed for that the deed warrants against all claims whatever "except the Wilson mortgage mentioned herein" which is the James Wilson and the Desda A. Wilson mortgage, not the Wilson mortgage in the complaint.

Second: There are no notes whatever assumed by A. L. Johns.

Third: It as clearly appears from this phrase that James Wilson and Desda A. Wilson are the mortgagors as it does that they are the mortgagees. It is ambiguous and uncertain of itself, whether they are mortgagees or mortgagors is a fact that cannot be assumed, but must be proved.

Fifth. A mortgage cannot draw interest in Arizona.

Sixth: The mortgagor in the complaint is John S. Armstrong and the mortgagee James Wilson only.

Seventh: The lands covered by each mortgage is different, the difference being the city lots worth $2,500.

Eighth: The mortgage here spoken of rests on land only, while the mortgage sued on rests also on $3,500 worth of water rights, the city lots worth $2,500 and two ditches, McKinney and Kirkland, worth $1,000 more.

Ninth: The mortgage in the complaint has attorney fees of 10 per cent, while the one in deed has none. The only similarity being:

First: The amount of the mortgage here referred same as mortgage in complaint.

Second: The name James Wilson appears in both, and as there are hundreds of James Wilsons, John Smiths and etc., the appelele should show where identity of name appeared by extrinsic proof, they were one and the same person.

Hence only one point, the amount, is certain.

This clause, therefore, does not tend to prove that Johns is even liable on any notes whatever, and certainly cannot be liable on any mortgage alone. The appellee could read his writ and then introduce a paper on which was written the amount set forth in his bill and with equal force and propriety claim a judgment, while R. E. Daggs, the grantor, does not assume any mortgage whatever. His grantee, A. L. Johns, does not assume any notes. As a whole it furnishes a mixture out of which nothing can be inferred in favor of the appelele. The mere fact that the amount happened to be the same proves nothing.

There was also introduced in evidence a deposition of A. L. Johns in another and different suit, and the only reference in that whole deposition, or squint at any proceedings in this case was, that A. L. Johns said, among other things, that he had purchased a tract of land near Tempe, known as the "Wilson tract," and that it was there shown that A. J. Daggs was the agent of R. E. Daggs in making sale of this Wilson tract of land.

There is nothing to show that the one hundred and eleven acres in suit here, or the city lots is the tract of land referred to by Johns in his deposition as "the Wilson tract."

There was also introduced parole testimony by the plaintiff of J. W. Evans, who testified that he went to the land mentioned and found W. A. Daggs in possession of the property as the tenant of A. L. Johns, and demanded the possession of Daggs, and Daggs refused to give him possession.

That he was the agent of James Wilson, and that James Wilson had not been in the territory since the year 1892.

The plaintiff then introduced R. E. Daggs as his witness, who testified that he was one of the defendants, and that he was president of the Bank of Tempe at the date of the first foreclosure suit in April, 1894; and that he did not know where the deed of R. E. Daggs to A. L. Johns was at that time, but that he supposed Johns had it; that he had not seen it since he executed it. That he did not know when the deed from R. E. Daggs to A. L. Johns was recorded; that there were a great many deeds come into the Bank of Tempe; and that as soon as they were there they were forwarded to the recorder for recording.

That he had received the full consideration of Eleven Thousand Five Hundred Dollars ($11,500) from A. L. Johns, and had executed to Johns his deed therefor; and described in detail the kinds of payment he had received.

That he had a lease with W. A. Daggs about the property (the one hundred and eleven acres, in suit), which lease had run out at the time he made the sale to A. L. Johns, or about the first of the April following the sale to Johns, 1894; and that he found W. A. Daggs in possession when he bought it; and that he remained in possession as long as he owned it; and when he sold it to A. L. Johns, W. A. Daggs arranged with A. L. Johns to remain as tenant of Johns upon the property; and that that was all he knew about it.

The appellee then produced the recorder, who brought with him the records, for the purpose of proving the warranty deed from R. E. Daggs to A. L. Johns, which contained the clause above referred to.

The appellee then closed his case, and the motion set out in this assignment of error was made and insisted upon by the appellants.

Urging that the rule first announced is correct, the judgment roll introduced by the appellee contains the sheriff's return, which contains in unmistakable terms that the

sheriff actually did receive the cash, and paid it over to the attorney for the appellee after deducting his fee, commissions and costs.

It only remains now to see what effect, in legal philosophy, a positive and unexplained and undenied sheriff's return has upon the appellee when introduced by him.

It has been laid down that the sheriff's return is conclusive between the parties to the suit of all matters returned, and is so far conclusive evidence that it cannot be contradicted, and was not attempted to be contradicted here, and is an indispensible monument to a title by the plaintiff.

U. S. vs. Slade, 2 Mason (U. S.) 76.

Black on Judgments, Vol. I, Par. 276 and cases there.

It will thus be seen that this sheriff's return is also a receipt; and imports absolute verity. Attached to this instrument also, as further proof that the debt was paid, is the receipt of Thos. Armstrong, Jr., the attorney for the appellee, who received the money.

The question arises, What effect a receipt has when thus introduced as evidence? against the appellee introducing it, it being unexplained and stands uncontradicted; and becomes prima facie evidence of the facts which it tends to prove; and goes to show conclusively that the plaintiff's (appellee's) attorney received the full payment of the debt; and by the introduction of the sheriff's return and the attorney's receipt simply proved himself out of Court.

Lyons vs. Williams, 15 Ill. Field 27.

Palmer vs. Priest, 1 Sprague (U. S.) 512.

Smith vs. Hoffman, 2 Cranch (C. C.) 651.

Lambert vs. Seely, 17 Howpr. (N. Y.) 432.

Spear vs. Ward, 20 Cal. 659.

And thus the record stands uncontradicted and unexplained that the claim is proved by the appellee is paid and the motion for judgment shall have prevailed.

The next question upon the evidence is, whether or not the assumption clause in the deed tends to prove that R. E. Daggs assumed and agreed to pay the notes and mortgages sued on to John S. Armstrong.

This Court has laid down the rule on this point by Mr. Justice Woods, for the Court said: "There must be words

in the deed of conveyance from which by fair import an agreement to pay the debt can be inferred."

Shepherd vs. May, 115 U. S. 505.

The notes sued on are duplicates, except one is due one year later than the other.

The notes sued on have a credit of date October 24th, 1893; but it is not shown who made the payment.

It is seen by the comparative analysis above that it cannot be understood from the clause of assumption in the deed, nor can it be warped by any kind of an inference to mean that the clause in the deed referred to tends to prove in any manner that R. E. Daggs even assumed the notes sued on, much less the mortgage.

The clause sought to prove an assumption of the mortgage sued on is as follows: "And second by mortgage of the same date as said notes on the land hereby conveyed." This merely to further describe the two notes. This reference describing the notes does not assume the mortgage. A mortgage is merely mentioned as existing on the property securing the notes.

The rule governing assumptions was succinctly stated by this Court in Elliott vs. Sacket, 108 U. S. 132 Reading, p. 140, where this Court says:

"An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of the mortgage, does not bind himself personally to pay the debt."

And further said: "That the language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee."

The clause above does not go so far as to say that he buys subject to the mortgage even. Neither does he say he assumes it.

First: Upon the face of the clause in the deed, as compared with the notes set forth in appellee's complaint are not alike, as shown by the comparative analysis above herein, and do not refer to each other. They are clearly a reference to two separate instruments.

Second: The evidence shows that the debt sued on has been paid.

Third: The deed says upon its face that "cash was in hand paid."

Fourth: That Eleven Thousand Dollars was thus paid for a far less amount of land than is contained in the mortgage, to-wit, the city lots.

Fifth: That the deed contained express covenants of warranty against all incumbrances and claims against the land, leaves the mortgagor in the position where he could not enforce the so-called contract of assumption against his grantee. How could the mortgagee take a greater right? It thus stands a mere nudum pactum. A contract which no one can enforce. How can subrogation happen? There is no asset of the mortgagor either immediate or remote that he could reach against his grantee. How, then, by "fair import" "can it be inferred" that an agreement was made to pay this debt? It is simply not there.

Sixth: That R. E. [illegible]s did not agree to pay any mortgage. This mortgage has additional obligations from the notes such as 10 per cent attorney fees, payment of taxes, insurance, and etc.

Seventh: That the notes are not the same notes.

Eighth: That there is no identity in the statements, and also by the comparative analysis herein above it is shown that eight reasons show that the notes and mortgage in suit were not assumed while there was identity in one, the amount, and hence a failure of proof, no proof.

Where the identity of the instrument is left in doubt, by the terms of the deed parole evidence must be introduced to make it clear that the instruments are one and the same; otherwise, thre is a failure of proof. There is no proof here.

The reason of the rule is, that it is the duty of the party upon whom rests the burden to prove every fact necessary to recover. And the Court will not infer it for him. If the instruments are one and the same appellee should have shown it by extrinsive proof.

"The identity of the mortgage assumed when left in doubt by the terms of the deed may be shown by parol evidence. Thus where a deed, in describing a mortgage assumed by the grantee gives its date and amount, but recites that it was executed by the grantor whereas it was executed by the grantor's grantor and there is no other mortgage of

like amount and date parol evidence is apply the covenent to the mortgage and reformation is not necessary."

Jones on Mortgages 740 A. and Cases.

Whereas a case like that at bar the only similarity being the amount with 8 other reasons and dissimilarities against it, with one covering property worth 7000 dollars more than the other of different dates and parties payee, surely the instrument proves nothing unless reformed to show that it meant the plaintiff's notes and mortgages and it is not admissable, even if parol testimony was offered to show the instruments referred to were one and the same without reformation, yet in this case while the appellee offered the tstimony of R. E. Daggs, one of the grantees, in his favor he did not ask him one solitary question about these instruments and there is not a jot or tittle of oral testimony in this record on this question.

N. Y. Life Ins. Co. vs. Atkin, 125 N. Y. 660.

26 N. E. 732.

Jackson vs. Sill, 11 Johns, 201.

Loomis vs. Jackson, 19 Johns 449.

Dobbs vs. Patter, 18 Barb. 193, 201.

Burr vs. Ins. Co. 16 N. Y. 267.

If it is argued by the opposition in defiance of the record that the person who purchased at the sale, James Wilson, is the same person as James Wilson, appelee, this position cannot be maintained. There are two reasons why the identity of name does not establish the identity of person:

The first is: It woud impeach a solemn record, i. e., the sheriff's return and satisfaction and judgment.

Bryan vs. Kales, 31 Pac. (Ariz.) 517.

The second reason is: That the sheriff's return, as well as the receipt by the plaintiff's attorney, casts a doubt upon the transaction, for it would hardly be reasonable to suppose that James Wilson, the plaintiff, would pay cash for property sold at the sale under a mortgage held by himself.

The sheriff had the money, deducted his fees and paid the net amount over to plaintiff's attorney. The attorney's receipt shows that he received and receipted for the net amount of the sale as paid him by the sheriff.

This casts a doubt upon the identity of the person at the transaction. Where this is true parole evidence is necessary to show that they were not one and the same person.

Abbott's Trial Evidence, p. 101, Par. 49, Note 6.

Jackson vs. Christian, 4 Wend. 277.

Abbott's Trial Evidence, p. 398.

Another reason is: That the name, James Wilson, is such a common name that it is unreasonable to allow the presumption of identity.

1st Whart. Ev. 665, Sec. 701.

If the appellee would have desired to reform the deed from R. E. Daggs to A. L. Johns so that it would show that his claim was actually assumed he should have brought his action for that purpose. Not having done so, and not having asked that the instrument be reformed; and not showing in any wise by parole testimony that it was the intention of the parties to the deed of John S. Armstrong and R. E. Daggs to asume the notes and mortgage, our contention most seriously is that he simply made a failure of proof, and that the court should have so held upon the motion or demurrer to the evidence.

The rule in such cases as laid down in this court is as follows:

"The judges are no longer required to submit a case to the jury, merely because some evidence has been introduced by the party having the burden of proof unless evidence be of such a character that it would warrant the jury to proceed in favor of the party introducing such evidence. Decided cases may be found, where it is held, that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury, there is, or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Commissioners vs. Clark, 94 U. S. 278-284.

In the contract of assumption by A. L. Johns the deed recites that he asumes a mortgage. The assumption of a mortgage by a grantee, where his grantor has not assumed to pay it and is nit liable on that mortgage, he is not liable.

King vs. Whiteley, 10 Paige (N. Y.) 465.

Biddell vs. Brizolara, 64 Cal. 354.

Morris vs. Nif, 4 Kan. 654.

New England Trust Co. vs. Nash, 46 Rep. 987.

Brown vs. Stillman, 43 Minn. 126.

Crowell vs. Courier, 27 N. J. Eq. 152.

Where it is said that such a contract is a mere undum pactum.

Dunning vs. Leavitt, 85 N. Y. 30.

We contend also that the same reasons and law that obtain to exempt R. E. Daggs from liability here also applies with equal force to his grantee, A. L. Johns, and by our comparative analysis we have shown that upon no hypothesis, except that the amount refered to is the same, can it be infered from the evidence introduced, or infered that A. L. Johns is liable upon the notes or mortgage sued on. That the amount is the same amounts to nothing, not even a scintilla, jot or tittle, and hence there is absolutely nothing tending to prove that A. L. Johns is liable.

We also urge the further proposition, in connection with this argument, for consideration: That we have heretofore urged by demurrer, that neither of these grantees are liable, even if it was admitted that they had assumed and agreed to pay these debts, which would be a most violent and irrational admission here, upon the principle that a grantee who assumes a mortgage and agrees to pay it does not become a principal debtor, and never becomes liable until his mortgagor is exhausted, which has never been shown to have been done in this case; and then only the mortgagee is entitled to be subrogated to the right of the mortgagor, and that right is the right a creditor has in equity to reach property belonging to his debtor when the debtor has been exhausted. The mortgagor could not enforce the contract of assumption against his grantee in face of the covenants of warranty in his deed, then how could the mortgagee be subrogated to a right the mortgagor did not have and could not enforce?

Keller vs. Ashford, 133 U. S. 610.

Shephard vs. Pepper, 133 U. S. 652.

Now, there being no parole testimony whatever offered to prove the so-called contract of assumption alleged in the complaint, but not set out, the contention on this point rests solely on the two clauses found in the two warranty deeds and herein set out in full, and the rights of the appellee to recover upon the breaches of so-called contracts of assumption of his claim and his right to foreclose of the lien of his alleged mortgage to satisfy the same. It must be wrung out of these two clauses we have shown that upon no theory that can be grappled from the books can it be

shown that the appellants are liable under the evidence and therefore the motion for judgment should have been sustained.

Reverting again to the opinion it will be seen that the court below held this assignment of error immaterial. In fact the opinion contains this language:

"Presuming that the decree declaring the deed void is correct and that the evidence fully sustains it," etc., which indicates that the trial branch of this case was never looked at; simply presumed the evidence sustained the decree and threw it over as "unworthy of their consideration."

Appellants ask the Honorable Court to sustain this motion for judgment.

ASSIGNMENT OF ERROR NO. 18.

THE COURT ERRED IN SUSTAINING THE JUDGMENT BELOW, "THAT BECAUSE THE SAID JUDGMENT IS VOID," AND SHOULD HAVE BEEN HELD FOR NAUGHT.

An examination of this judgment will disclose a mass of inconsistency, ambiguity and viciousness that is not understandable. Its analysis shows:

The analysis of the judgment in this case will show without doubt that it is absolutely and irreconcilably void.

I

It sets the sale—certificate of sale—deed and satisfaction of the first judgment aside and reinstates the first judgment of $7,190, out in full force and ordered the clerk to cancel the satisfaction of the judgment on the record. This is the judgment appellee alleges in his bill is against John S. Armstrong and R. E. Daggs and is the lien covering all of John S. Armstrong's property of over 30,000 dollars. The mortgage lien was also foreclosed against this claim.

II.

It also gives personal judgment against R. E. Daggs and A. L. L. Johns upon the assumption clause for $8,541.13 and that $6,500 of this sum bear 8 per cent while the balance draws 7 per cent to be recovered as well, and which last amount includes an attorney fee of $350.00.

III.

It is then decreed that the sum of $8,541.13 is a lien upon the property described in the bill, and although the

city lots are described in the bill, the mortgagor, their owner, is not before the court. Yet the judgment declares "which mortgage and lien is hereby foreclosed, and decreed to be wholly unpaid and unsatisfied."

IV.

It is then adjudged and decreed that all the appellants are guilty of conspiracy to cheat and defraud appellee out of the fee and possession of the land described, and upon such charge of conspiracy it is adjudged and decreed that the deed from R. E. Daggs to A. L. Johns is fraudulent and void as to this (plaintiff) appellee.

V.

It is now decreed that the first judgment, $7,190.10, "do stand," and that it be carried into effect by execution and order of sale against the property therein described, and that his lis pendens in his first suit was full and complete notice to A. L. Johns of his first suit and of the conveyance which had been first set aside.

And also decreed that the deed from R. E. Daggs to A. L. Johns was given and recorded solely to cheat and defraud the creditors of R. E. Daggs and especially appellee and to cast a cloud on the title to any purchase at sheriff's sale of the mortgaged premises.

VI.

It is then ordered, adjudged and decreed that orders of sale issue to sheriff and that he seize and sell the property covered by the mortgage to satisfy his first judgment of $7,160.10 (which judgment includes $350.00 attorney fees and $24.80 costs) "with costs and accruing costs," and if the property fails to sell for enough to pay the judgment the costs and accruing costs, then the sheriff make the balance due upon this judgment, the judgment for $8,541.13, out of any other property of R. E. Daggs and A. L. Johns, (A. L. Johns was not a party to the first suit it must be remembered) and if the property fails to sell for enough to pay the first judgment of $7,141.13 the balance due must be made out of J. S. Armstrong, R. E. Daggs and A. L. Johns. So it is seen that when the mortgaged property is sold if it fails to satisfy judgment No. 1954 of $7,161.13, with costs and accruing costs, the balance must be made out of J. S. Armstrong, R. E. Daggs and A. L. Johns, and this judgment No. 2327 of $8,541.13 must be made out of R. E. Daggs and A. L. Johns. So we have one personal judgment against John S. Armstrong of $7,161.10, at 7 and 8 per cent interest, two personal judgments against R. E. Daggs, one for $7,160.10 at 7 and 8 per cent interest, and the other for $8,541.13 at

7 and 8 per cent interest, and two personal judgments against A. L. Johns, one for $7,160.10 at 7 and 8 per cent interest, the other for $8,541.13 at 7 and 8 per cent interest. Although Johns was not a party to the first suit, with a judgment finding all the appellants guilty of conspiracy and setting the deed from R. E. Daggs to A. L. Johns aside for good measure.

VII.

It is then adjudged that all parties defendants, appellants here, have notice of his lis pendens filed April 26th, 1894, and that their rights are decreed severed, and that at end of six months sheriff execute deed to property to purchaser. The property described to be sold here is the 5 city lots, the 111 acres of land, the water right and the ditch rights.

VIII.

It was also decreed that appellee have the right to apply force for a receiver upon the pleadings and judgment; he should have a good smart one, too, to carry this judgment into effect. It is here seen that the first foreclosure covered only the 111 acres and water right against the mortgagor and R. E. Daggs while the last covers the city lots belonging to the mortgagor, who is not a party to this suit, while the decree adjudging A. L. Johns bound to pay his first judgment, and he was not a party thereto. What shall be done with this blunderbus decree and piecemeal foreclosure? We contend it is upon its face without argument or authority; absolutely void.

Now, reverting to the opinion. It was attempted to modify this wonderful decree by a mere suggestion and reference to folios, and as the folios referred to are 264-5 and 261, in this record, are in the bill of exceptions and not the judgment. The folios in the judgment being 101 to 108, neither this court or counsel can know what was meant. It can, however, be grappled from his honor's language that he intended to relieve Johns from one of the judgments against him, but as there were two judgments given against Johns it cannot be understood which one was meant. Unless it can be said from the language and the reference to Johns in the direction to the sheriff, "That said sheriff make the balance due upon said judgment out of any other property of said defendant R. E. Daggs and A. L. Johns as an ordinary execution," as shown in folio 270. Refering to the analysis of the judgment it is seen that if it is said it is meant to exempt Johns from one of these judgments the other still stands. If it was intended to have exempted

Johns from both personal judgments the jurist below would have so said in plain language. There being no judgment at the places refered to it is left in doubt what was done. We then have it that as best counsel can understand there is yet one prsonal judgment against A. L. Johns with his deed set aside to the property and he was not a party to the first. Two personal judgments against R. E. Daggs for $15,701.23 and two foreclosures of same mortgage while John S. Armstrong, the mortgagor, has the first judgment of $7,190.10 with a foreclosure against him re-decreed in this suit while he was not a party to the last suit. We therefore submit this judgment is absolutely void.

The assignments of error upon the bill of exceptions are as follows: (See R. P. 143 for bill of exceptions.)

ASSIGNMENT OF ERROR NO. 19.

"THE COURT FURTHER ERRED IN AFFIRMING THE JUDGMENT, AND AFFIRMING THE RULINGS ON THE ADMISSION OF EVIDENCE, AND IN ADMITTING EVIDENCE," AS FOLLOWS:

"The Court further erred in affirming the judgment, and affirming the rulings on the admission of evidence, and in admitting evidence," as follows:

Of one J. W. Evans, who was permitted to testify that he had went to the property in question and asked of the tenant (whom he found in possession) possession of the property, and to give a conversation between himself and W. A. Daggs (to the effect that Daggs was the tenant of A. L. Johns, and had been such tenant since Johns had purchased) and about the property upon which the said W. A. Daggs, the tenant, lived, and to testify about a sheriff's deed in case of Wilson vs. Armstrong and R. E. Daggs; and to testify that W. A. Daggs, the tenant, had refused to give up possession. Over the objection of the appellants, that the same was incompetent, irrelevant and immaterial; and for the further reason that it was not yet shown that any such a case existed.

The appellant also asked the Court to strike out this evidence as against A. L. Johns, because the defendant Johns was not present.

All of which objections were overruled, and exceptions taken at the time.

The appellants contend that this evidence introduced was clearly without right, and should have been stricken out of the Court, because there is no issue in the pleadings to

which any of this evidence could possibly have any reference. ioffIh" 7u,OY rev-k sthe e,anda IIo,re Wffi 6rdg 34 lffi mh

It could not be competent as to A. L. Johns, because he could not be bound in any manner by conversation between his tenant and J. W. Evans, a stranger, when he was not present; and hence appellants contend that the Court erred in allowing such evidence to be introduced over their objections.

ASSIGNMENT OF ERROR NO. 20.

"THE COURT ERRED IN ADMITTING THE EVIDENCE CONTAINED IN THE DEPOSITION OF A. L. JOHNS, TAKEN IN ANOTHER SUIT," THE SUBSTANCE OF WHICH IS:

That said Johns lived in Chicago, Illinois. That he is a live stock commission merchant, and real estate in the Union Stock Yards. That he was subject to rheumatism about the damp climate of Chicago. That he desired to purchase some land which was in a warm country. That he had advertised for property in the Chicago Drovers' Journal. That he had had some correspondence with R. E. Daggs. That A. J. Daggs had come to his office in Chicago, Illinois, and had entered into some contracts with him for the sale of some land. Among other tracts sold to him, after abstract of title had been furnished him and passed on by his attorney, was the "Wilson tract" near the town of Tempe.

Johns also testified that he was not related to R. E. Daggs or A. J. Daggs. This is the only mention made by Johns of the property, or any intimation of the property of this suit.

This evidence was produced in the form of a deposition, which deposition had been taken in another suit.

The appellants objected to this deposition, for the reason that under the statute they had had no notice that the same would be produced in evidence.

And on the further ground that the said deposition was incompetent, irrelevant and immaterial.

What relevancy this deposition could have to any issue in this case appellants admit they are unable to see, as it does not even identify the land in suit.

It is not a deposition taken in this case at all.

It does not relate to the consideration of the deed of Johns or R. E. Daggs.

It shows that Johns was not related, in any manner at all to said R. E. Daggs or any one of the other appellants.

If it is said that it was introduced for the purpose of showing fraud we contend that it is no fraud for a commission merchant in Chicago to buy and pay for property in Arizona Territory.

And we further say that we are unable to find any legal reason for its competency, its relevancy or its materiality.

ASSIGNMENT OF ERROR NO. 21.

"THE COURT FURTHER ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF R. E. DAGGS IN REGARD TO QUESTIONS RELATING TO THE LONDON COMPANY."

Wherein the plaintiff was permitted to cross-examine his own witness as to when the company was organized. As to where it was organized, over the objections that the questions had no relevancy to the issues in this case, and over the objections and exceptions that it was incompetent, irrelevant and immaterial.

This was the (plaintiff's) appellee's own witness and he was bound by his statements whatever they may be.

The plaintiff was also permitted to ask what other property had the London Company at the time it transfered its stock for the purchase of the land in question to A. L. Johns.

The defendants objected to any testimony relative to the London Company, for the reason that it was not a party to this action, and that such testimony was incompetent, irrelevant and immaterial.

All the objections were overruled by the Court and defendants excepted.

The witness was then compelled to testify all about the property of the London Company; and how many acres of land it had owned; and how many cattle and other stock it owned; and whether or not its property was free from incumbrance; and what the consideration of the deed from A. L. Johns to the London Company was; and who recorded the deed.

Thereupon the defendants objected again that the testimony had no reference to the issues of the case.

Objection was overruled and the defendants excepted.

The counsel for the plaintiff then cross-examined his own witness about the minutia of the consideration of the transfer of the property of A. L. Johns to the London Company, and about the dealings between the London Company and A. L. Johns.

The appellants contend that under no theory of the pleadings in this case was this evidence competent, relevant or material. That The London Company, not being a party to this action it could not matter in this suit how much it owned, what the character of the property was, or what the dealings of A. L. Johns was in regard to the business between him and the president of the London Company. That it cannot be a crime, tort nor any other character of fraud or negligence for A. L. Johns to sell any piece of property that he may have, and for these reasons the testimony is entirely improper, and this record should not have been burdened with this testimony. If it is urged to show fraud then we say there is not one of the acts set forth in the bill or proved by the evidence that is any other than plain everyday, everybody dealings, and if it be fraud then human conduct is but a mass of fraud.

ASSIGNMENT OF ERROR NO. 22.

"THE COURT ERRED IN ADMITTING IN EVIDENCE THE WARRANTY DEED FROM JOHN S. ARMSTRONG TO R. E. DAGGS, OVER THE OBJECTIONS AND EXCEPTIONS OF THE APPELLANTS, FOR THE PURPOSE, AS IT WAS STATED, TO PROVE THE ASSUMPTION OF THE NOTES SET OUT IN THE COMPLAINT."

The notes set out in the complaint are described, to-wit:

Phoenix, Ariz., April 24th, 1893.

(Which two notes are in duplicate except that one is due one year later than the other.) For value received, on or before the 24th day of April, 1894, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phoenix, Arizona, Three Thousand Two Hundred and Fifty Dollars, at 8 per cent interest, payable semi-annually, and signed,

John S. Armstrong.

The assumption clause in the deed introduced for the purpose, as it was said, to prove that R. E. Daggs had as-

sumed and agreed to pay the above described note was as follows: "The said Robert E. Daggs hereby assumes the payment of, and agrees to pay, two certain promissory notes, each for the sum of Three Thousand Two Hundred and Fifty Dollars, executed by John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson, his wife, and secured by mortgage of the same date as said notes on the land hereby conveyed."

The appellants objected to the introduction of this deed on the ground that it did not refer to any issue in this suit, and is incompetent, irrelevant and immaterial.

Objection overruled, and defendants excepted at the time.

We have cited authorities heretofore upon the proposition of assumption which are applicable under this assignment of error. It is but necessary, under this assignment of error, to compare the clause in the warranty deed which was introduced to prove that R. E. Daggs had assumed and agreed to pay the two notes sued on, and the mortgage.

The notes that are called for by the clause of assumption were executed by John S. Armstrong to James Wilson and Desda A. Wilson.

Dated April the 18th, 1894.

There is but mere mention in the assumption clause that these two notes are secured by mortgage of the same date.

The only reference between the two instruments is, one was executed by John S. Armstrong, as was also the other, who is not shown to be the same person; and the amount appears to be the same in the two. The analysis heretofore shows there are nine points of difference and one alike in the instruments referred to, the amount being the same in each.

The Court is bound to presume that these two sets of instruments exist unless there is something in the proof to show the contrary, and there is nothing.

This instrument is not reformed by any procedure, nor was the set of facts, set forth in the notes as sued on by plaintiff shown by parole testimony, even if parole testimony would have been competent to be the same notes; hence, they being entirely dissimilar the assumption clause in the warranty deed fell under the objection made by the appellants to its introduction.

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Abbott's Trial Evidence, p. 720.

That the deed from John S. Armstrong to R. E. Daggs as well as the one from R. E. Daggs to A. L. Johns were warranty deeds.

The laws of Arizona governing the construction of deeds is as follows:

Par. 223,, Sec. 10. "From the use of the word 'grant' or 'convey' in any conveyance by which an estate of inheritance of fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied unless restrained by the express terms contained in such conveyance.

"1. That previous to the time of execution of such conveyance the grantor has not conveyed the same estate or any right, title or interest therein, to any person other than the grantor.

"2. That such estate is at the time of the execution of such conveyance free from incumbrance.

"3. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

"Par. 224, Sec. 11. The term 'incumbrances' includes taxes, assessments and all liens upon real property."

A mortgage in Arizona is but a mere lien made so by statute.

Revised Statutes of Arizona Territory, Par. 3155, Sec. 24, is as follows:

"A mortgage of the real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

Such a mortgage passes no estate in the land.

It is observed by the plain terms of these statutes and by the clause in the deed, which is "That the said party of the first part, for and in consideration of the sum of Eleven Thousand dollars to him in hand paid by the said party of the second part does by these presents, now 'grant, bargain, sell and convey' unto the said party of the second part and to his heirs and assigns forever, etc." Then follows a description of the property, which is far less than the property described in the mortgage, John S. Armstrong reserving a large portion of the property to himself.

It is hardly fair to infer that John S. Armstrong would be able to sell this property for a full cash consideration and reserve a large portion to himself, and at the same time have the parties who bought assume at the same time a large indebtedness, when the value of the whole property would not exceed the sum of the price paid by this grantee.

It is more proper to reason that he got enough out of the sale to pay the full indebtedness and what he had paid out in cash, and made his cash profit as well as the property he reserved; and as his deed shows bound himself to pay the claim of appellee which he could well afford to do, and as this is what the contracts of the parties show we insist this is the proper deduction.

ASSIGNMENT OF ERROR NO. 23.

"THE COURT ERRED IN ADMITTING THE WARRANTY DEED OF R. E. DAGGS TO A. L. JOHNS IN EVIDENCE OVER THE OBJECTION OF APPELLANTS; THAT IT DID NOT REFER TO ANY ISSUE IN THE CASE AND IT WAS INCOMPETENT, IRRELEVANT AND IMMATERIAL."

This deed was put in by appellee to show that said Johns had agreed to pay the claim of appellee. The clause said to prove this is as follows:

"The said A. L. Johns buys the herein described lands with full knowledge of the now existing James Wilson and Desda Wilson mortgage of six thousand five hundred dollars and hereby assumes and agrees to pay the same."

And in the covenant of warranty this clause appears: "Except the Wilson mortgage herein." This clause is every dust of evidence offered to prove that A. L. Johns assumed the notes and mortgage of appellee. From this clause it cannot be infered by any process of guessing, much less reasoning or influence, that the notes and mortgage sued on are meant or intended to be assumed. This is a mortgage called the James Wilson and Desda A. Wilson mortgage. These names are merely used to designate or describe a mortgage and it cannot be understood whether these parties are the mortgagees or the mortgagors. No payees or payors mentioned. It does not mention any notes whatever. A mortgage is the mere evidence of a lien in Arizona, as we have heretofore shown. The notes are the evidence of the debt. The assumption of a note might carry the mortgage but the assumption of a mortgage never carries the debt. We therefore contend that this evidence was wholly improper and it was error to admit the same.

ASSIGNMENT OF ERROR NO. 24.

"THE COURT ERRED IN MAKING AND PROMULGATING THE SO-CALLED STATEMENT OF FACTS IN THIS CASE BECAUSE SAID STATEMENT OF FACTS WILL NOT SUSTAIN THE JUDGMENT IN THIS CAUSE NOR ANY PART THEREOF."

A statement of facts must not be a mere statement or recital of the evidence, "but the facts as found from the evidence."

Ins. Co. vs. Tweed, 7 Wall, reading page 51.

It canont be "a mere report of the evidence but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the (facts) propositions of facts which the evidence establishes and not the evidence on which these ultimate facts are supposed to rest."

Norris vs. Jackson, 9 Wall 127.

Lenison vs. Geuard, 21 Wall 302.

In Lemon vs. Dick, 148 U. S. 7, Mr. Justice Gray said: "No mere recital of the testimony, whether in the opinion or in a bill of exceptions, can be deemed a special finding of facts within its scope."

Saltstall vs. Poutwell, 150, U. S. 417.

Nor can the opinion of the court "assigning reasons for its conclusions" be treated as a finding of fact to enable the court to determine whether the statement of facts sustain the judgment.

British Queen iMning Co. vs. Baker Silver Mining Co., 139 U. S. 222 and cases there cited.

No bill of exceptions is necessary to bring the question on statement of facts whether it sustains judgment.

Berger vs. Schllinger, 152 U. S. 581-6.

In Glendersleeve vs. New Mex. Mining Co., 163 U. S. 109, reading page 118, this court said: "It has been frequently held that the authority of this court on appeals is limited to determining whether the court's findings of fact support its judgment or decree and whether there is any error in rulings duly excepted to in the admission and rejection of evidence."

Hanison vs. Perea, 168 U. S. 311.

This rule does not preclude this court from an examination to see whether there is any evidence at all to sustain the findings. If so, then this court has no means of protecting a litigant or preventing a fraud upon itself from a concocted statement of facts, however bogus or false.

In determining the scope of the inquiry upon which a review of the statement of facts is treated, it has been said by Mr. Justice Gray: "The question whether the facts found by the court in the case at bar are sufficient to support the judgment below includes the several questions of law effecting the merits of the case."

Allen vs. St. Louis Bank, 120 U. S. 30.

The amount in dispute being over $5,000, to-wit: $6.500 and interest, determines the jurisdiction.

The statement of facts made and suit here by the court below is as follows:

STATEMENT OF FACTS.

The Court finds the facts in the above entitled case to be as follows:

I.

That on the 24th day of April, 1893, John S. Armstrong executed a mortgage on certain real estate described in the complaint herein to James Wilson, to secure the payment of two certain promisory notes in said complaint set forth, each being for the sum of $3,250.00 and interest, and dated on said 24th day of April, 1893.

II.

That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant R. E. Daggs (appellant here), and conveyed the same by certain deed of conveyance, in which said defendant R. E. Daggs agreed and bound himself, his heirs, executors and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

III.

That on the 26th day of April, 1894, default having been made in the payment of the said notes, secured by said mortgage, the said Wilson commenced an action in the District Court of Maricopa County against the said Armstrong and R. E. Daggs for the recovery of the amount due upon said notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a lis pendens in the office of the Recorder of said County.

IV.

That at the time of the beginning of said suit, the defendant W. A. Daggs was in the possession of the said premises; and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

V.

That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said District Court on the 8th day of May, 1894, against the said defendants J. S. Armstrong and R. E. Daggs for the full amount due with costs and for the foreclosure of the mortgage.

VI.

That thereafter and on the 6th day of June, 1894, the said premises were sold by the Sheriff of Maricopa County under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said Sheriff, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs then being found in possession, refused to surrender the same and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and occupy said premises and property as such tenant of A. L. Johns to the total exclusion of plaintiff James Wilson.

VII.

That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action, and the

filing of the lis pendens aforesaid, a deed was placed on record in the office of the County Recorder of said County, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns of Chicago, Illinois.

That at the time the demand for possession as aforesaid was made by said Wilson upon the defendant W. A. Daggs, said W. A. Daggs claimed and asserted that on the first day of April, 1894, he ceased to be the tenant of said A. L. Johns, and took possession of said property for said Johns at said time and from that time forward held possession of said premises as the tenant of said A. L. Johns and not as the tenant of said R. E. Daggs.

VIII.

That at the time of the commencement of said action to foreclose said mortgage, the said plaintiff in said action James Wilson had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim whatsoever to said premises.

IX.

That said defendants R. E. Daggs and A. J. Daggs did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises, and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs and for the purpose of hindering, delaying and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.

Richard E. Sloan, Presiding Justice.
Fletcher M. Doan, A. J.
Webster Street, C. J.
Geo. R. Davis, A. J.

(See R. P. 140, F. 253 to R. P. 142 inclusive.)

Upon the foregoing statement of facts appellants offer the criticisms: First, it is largely a mere recital of evidence and not of ultimate facts. Second, it contains extracts copied from the opinion of the court below, which opinion was copied from the appellee's complaint. Third, extracts copied from the famous judgment of appellee. Fourth, it abounds in conclusions of law. Fifth, and is padded and upholstered throughout with false statements upon which there is not a dust or molecule of evidence in all the record to sustain—not some evidence, but none. The statement of facts should be a strict and honest deduction from the evidence and not a copy of the opinion, complaint or judgment, nor conjecture.

Proceeding to analyse the so-called statement of facts:

The so-called statement of facts No. I, II, III, is almost a verbatim copy of a part of the opinion of court below, (see R. P. 107-108) which opinion was in turn copied from the complaint of appellee. (See R. P. 3.) The court below further in its opinion used this language: "Presuming that the decree declaring the deed void is correct and that the evidence sustains it." (R. P. 112.)

This wholesale copying expediency, plus the statement here quoted indicates a grievous blunder has been made, and that they presumed the evidence sustained the complaint as they did that it sustained the judgment. The truth is, the most rigid examination of this record will disclose nothing to show that R. E. Daggs agreed and bound himself, his heirs, executors and assigns to pay the notes and mortgage of appellee.

The assumption clause in the deed from John S. Armstrong to R. E. Daggs is as follows: "The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of three thousand two hundred and fifty ($3,250) dollars, executed by said John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson, his wife, and secured by a mortgage of the same date as said notes on the land hereby conveyed."

The above is every particle of evidence in this record that is offered to show that R. E. Daggs agreed and bound himself to pay the following note and mortgage securing it:

No. 1. Phoenix, Arizona, April 24, 1893.

On or before the 24th day of April, 1894, without grace, for value received, I promise to pay to the order of James

Wilson at the office of J. W. Evans, Phoenix, Arizona, Three Thousand Two Hundred Fifty Dollars in United States coin, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. (Signed.)

($3,250.) John S. Armstrong.

The other note is a duplicate of this one except it falls due one year later.

The mortgage is of the same date of the notes and contains copies of the notes, is signed by John S. Armstrong, and covers the following property: 111 acres of land, 66 inches of water in Tempe Irrigating Canal, 5 city lots in Tempe, Arizona, and pro rata share No. 2 in McKinney and Kirkland ditch, and all lateral ditches to the same.

Carefully comparing the above assumption clause in the deed from John S. Armstrong to R. E. Daggs with the notes and mortgage sued the following will appear:

First. That the date of the assumption clause instruments are April 18, 1893, while the date of the note and mortgage sued on is April 24, 1893.

Second. That the name of the payor referred to in the assumption clause is John S. Armstrong, while that in the notes and mortgage is John S. Armstrong and Jno. S. Armstrong.

Third. That the amount referred to in the assumption clause is $3250 in each note.

Fourth. That the payee of the notes mentioned in the assumption clause is James Wilson and Desda A. Wilson, while the payee of the notes sued on is James Wilson, only.

Fifth. That the mortgage referred to in the assumption clause is merely referred to without stating who executed it, what property it covered, except that it covered the land hereby conveyed, which was 111 acres, while the mortgage sued on covers 111 acres of land and in addition thereto 5 city lots, worth $2,500, 66 inches of water, right in the Tempe Irrigating ditch, worth $3,500; share No. 2 in the McKinney and Kirkland ditch, worth $1,000, and all laterals, worth at least $500 more.

Sixth. R. E. Daggs, by the assumption clause, assumed notes only, and as descriptive of the notes this language is used: "And secured by a mortgage of the same date as said notes on the land hereby conveyed."

Seventh. The assumption clause in the warranty deed disputes the terms of the deed and makes it impossible that any part of the consideration was left unpaid. Such a hypothesis would dispute the verity of sealed instruments.

Eighth. The assumption clause does not say that the mortgage it refers to was ever of record or who was the mortgagee therein, while the mortgage here sued on is of record and the mortgagee is James Wilson.

It is then seen that the only point of similarity between these two sets of instruments is the amount referred to is the same. Any other paper having a like amount would be as satisfactory proof ast hat. It is no proof.

Well, it is said the name John S. Armstrong is the same. True, but there are so many names alike that where the identity of name appears and there is a dispute as here, the burden is on plaintiff to show the person referred to is one and the same by parole testimony. None appears in the record, so there is no evidence.

(See authorities supra on this point.)

Thus the statement of facts No. 1, 2, 3, as they were taken from the opinion, which opinion was taken from the appellee's complaint, has not molecular dust to rest upon. Again, statement of fact No. 3 contains this language copied from the opinion of the court below (R. P. 107): "And on the same date filed a lis pendens in the office of the recorder of said county."

This statement is absolutely false. The most scrutinizing search of all the evidence in this case will fail to disclose a particle of evidence about a lis pendens. None was ever put in evidence in this case. But as the Honorable Court below copied the statement of facts from the opinion and the opinion was likewise copied from the complaint of appellee, and they presumed the judgment correct and the evidence sustained it, they must have presumed the complaint of appellee was correct and the evidence sustained that also.

So far the statement of facts presents a mere copy of the opinion, a statement resting upon nothing and purely an assumption, upholstered with a false injection of the courts.

Will this mixture sustain the judgment? That judgment which gives one judgment against John S. Armstrong, two judgments against R. E. Daggs, two judgments against A. L. Johns and sets his deed aside at the same time with a

roving judgment against all parties defendant for conspiracy. We think not.

Again, the statement of fact No. 4 was copied from the opinion. (See R. P. 108.) It is true W. A. Daggs was living on the property openly and notoriously with his family when the first piecemeal suit was brought, but he was not made a party thereto. The opinion says he was in possession supposedly as the tenant of R. E. Daggs. Where the learned court below got the authority to say that this tenant was supposedly the tenant of any one this record fails to disclose. He was there and the appellee admits it, and had been for a long term of years under every owner of the property. His presence was notice of his landlord's title, just as much as if the landlord himself had been there on the farm, too.

W. A. Daggs could not be guilty of a conspiracy because he was the admitted tenant of this property.

Again, statement No. 5 was copied verbatim from the opinion. (See R. P. 108.) It is seen this statement of fact is copied from the opinion and the opinion is likewise copied from the appellee complaint (R. P. 4) with the false statement as to R. E. Daggs that judgment was taken in full upon the notes against him. (R. P. 45.) Where the judgment shows that no personal judgment was taken against R. E. Daggs in his first piecemeal foreclosure suit and the name of R. E. Daggs does not appear in the judgment except in the caption. A later clause in the judgment contains this language: "And that the defendants and all persons having liens subsequent to said mortgage and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of the notice of the pendpendency of this action in the office of the County Recorder of Maricopa County, Arizona, on the 11th day of March, 1894, be forever barred and foreclosed of all equity of redemption," etc.

It is seen that the recitals in this statement of fact present the same characteristics as the former statements. The Honorable Court could not resort to the opinion of the court below to help a statement of facts and have so held. Now these statements are copied from the opinion and presented to this court as a true statement of he facts.

It would be as competent to take the facts as stated in the opinion as it is to copy them and call them a statement of facts, and when it is seen also that the opinion is a mere copy of the appellee complaint it then appears that this court is not to have a statement of facts based on the evidence, but a statement of facts copied from the opinion of the court be-

low, which opinion is likewise copied from the appellee complaint. This state of matter sugar-coated with such false statement as judgment was, "and R. E. Daggs for the full amount due with costs." This is the statement of facts upon which the lower court gave its judgment and it is made here for this court to sustain the judgment with.

A statement of facts is defined by this Court to be "a finding of propositions of facts which the evidence establishes."

Jones vs. Jackson, Supra.

Now will a mere copy of the opinion which itself is but a copy of appellee complaint coupled with false statement of fact, be a statement of "propositions of facts which the evidence establishes."

Had the Honorable Court not as well be told by the Inferior Court to read our opinion and complaint of appellee and sustain our judgment as to copy them and send them here as a statement of facts?

Again, statement of fact No. VI is again copied verbatim from the opinion of the court below (see R. P. 112), which statement in the opinion was copied from the complaint of appellee (see R. P. 4 and 5), and like its former kinsmen contains absolutely false statement in that it says execution was issued. Not so. If he had he would have got the cash on it. This suit would not be in this Court today an order of sale issued, but no execution. This false injection is to have this Honorable Court believe that the plaintiff is not refusing to issue execution against the mortgagor if he has any claim They fear it is not good faith to have a judgment against a man worth $300,000 (see R. P. 67-68-70), and refuse to issue execution against him, while they clamor they can't get their pay. This record fails to disclose such a thing as an execution. It also fails to show that the plaintiff bid the property in at the sale. The record shows it was bid in by James Wilson, who paid cash to sheriff, who in turn paid it over to the appellee attorney (see R. P. 50.) If appellee should have desired to show that James Wilson, the purchaser at the sale, was the James Wilson, plaintiff, he should so proved. He could not do so, so he left the record bare as it is. (If we were entitled to go out the record we could truthfully say Wilson, purchaser, was the cohort of the mortgagor.)

There is nothing in the evidence to show there ever was a deed issued upon the sale of the property. There is no deed in the record. As to the redemption there is nothing

in the evidence to show anything whatever about that. These are pure gratis assumptions of the Court below, taken from the opinion and appellee complaint. That the tenant refused to give him possession is of no consequence. It is a singular state of things that appellee relies on sending an agent to bluff the tenant out of possession and refuse to issue a writ of assistance, and then the Court below sees so much in that that a statement of facts is made upon it. How can such stuff prove the liability of R. E. Daggs or in any manner show fraud on the part of any of these appellants?

Statement of fact No. VII down to the word Illinois is a verbative copy of a clause in the opinion (see R. P. 108). The balance except the word Wilson is also a verbatim copy of the complaint, which was also partially garbled from the appellee complaint, but is changed to show as far as possible and have it appear that the only time James Wilson knew of W. A. Daggs, the tenant, was when demand for possession was wade December 12, 1894. This is to remove as far as possible the fact that James Wilson knew of W. A. Daggs' tenancy, and A. L. Johns, his landlord, and the whole of their rights when he first sued, so that it will be presently tenable to say Wilson had no notice of their rights, but unfortunately for them the appellee alleges in his bill that W. A. Daggs "at or about th time of recording of said deed to said Johns, to-wit, on the 28th day of April, 1894, claimed and asserted to have abandoned said premises and property as tenant of R. E. Daggs on or about April 1st, 1894," and became the tenant of A. L. Johns. This shows appellee had a coloquy about the property on that date and the tenant told him face to face all about it. Still neither the tenant nor Johns were brought in and it is all stuff to say he had no notice or to say as is said or the inference cast that a lispendens was filed. No such a paper in this record. It is false. There is nothing whatever in the rabble about Johns' deed being placed on record after summons or lispendens. If Johns didn't put his deed on record, what of it? His tenant was on the property. Suppose Johns in person had been on the property with his deed in his pocket when appellee first sued? It could be as loudly yelled that he was there supposedly as the tenant of R. E. Daggs, in whom so far as the record disclosed the title appeared to be. This statement proves nothing. It does not show any one guilty of fraud. Fraud consists in the intention and in a deed that it has no consideration. All parties must participate. It would amount to nothing whatever if Daggs said all they say he said in the statement. It's no fraud. And if these two parties even if they knew about the first suit and the lispendens and they still went about their business, that's not fraud.

This clause, like the rest, is not founded on the evidence, but copied from the opinion and is so made as to inferentially contradict the appellee bill about appellee having and knowing all about Johns' deed.

Singular as it is, appellee proved by his own testimony that Johns had paid every dollar that the deed calls for. Still no statement of fact is made on that. It is not found Johns paid a valuable consideration, neither is it found Johns paid any consideration. Silent. Silent.

Statement of fact No. VIII is still another one of the same as before, copied from the opinion (see R. P. 109.) This in turn was copied from the appellee bill (see R. P. 5). This is the boldest of them up to it. While it is copied out of the opinion and the opinion copies the appellee complaint, This is the first so-called statement that is totally and absolutely false. There is no evidence whatever in this record about it, not a particle, and it is put here in the face of the finding that the tenant was on the premises and they knew it, but they did not make him a party, and if he had no notice does it prove fraudulent intent or that Johns' deed was without consideration? They seem to be looking for sham excuses for appellee. Does this even up the appellee default in refusing to issue execution? It is a claim flatly contradicting the appellee's bill and contradicts the former finding that W. A Daggs was on the property.

Statement of fact No. IX: This statement in part is taken from the opinion (R. P. 108-9) which is likewise copied from the appellee bill (R. P. 4), while the balance of this statement is a verbatim copy of a part of the judgment of appellee (see R. P. 58.) It is not only false, but flatly contradicts the evidence. It abounds in conclusions of law such as: "That said deed was fraudulent and void." Facts should be stated showing this deed fraudulent and void. No deed can be set aside on such statement as that.

It is like its previous kinsmen, padded with a false statement, to-wit: "And was recorded by him, the said Daggs." The deed on its face shows as follows: "Filed and recorded at the request of Bank of Tempe April 28, 1894. at 8:30 a. m."

Appellee also proved by his own testimony the direct examination of R. E. Daggs as follows:

Q—Where was this deed from you to Johns at that time —at the time the summons was served on you in this case of Armstrong and Wilson against you?

Ans.—I don't know.

Q.—How long since you have seen it?

Ans.—I don't remember now, but I suppose I have not seen it since I executed it.

Q.—Were you present at the time of the summons of this case?

Ans.—Yes, sir.

Q—Do you know when the deed from yourself to Johns was recorded?

Ans.—I do not know; I will state that there was a good many deeds that came into our bank and we forwarded them to be recorded. (See R. P. 27.)

Again on (R. P. 33) the following was asked:

Q.—Do you know what you did with the deed you executed to Johns?

Ans.—I sent it to him, of course, or sent it to Mr. A. J. Daggs for him.

The evidence of this witness also showed that this sale to Johns was made through A. J. Daggs, his agent, who was doing business in and out of Chicago with live stock.

And this is every particle of evidence on the point of who recorded the deed from R. E. Daggs to A. L. Johns, and this was all evidence produced by the appellee, which he never attempted to dispute or disprove. Still the court below makes the alarming statement that this deed from R. E. Daggs to A. L. Johns was recorded by him the said R. E. Daggs to hinder and obstruct, and etc. This statement is not only false, but it contradicts every particle of evidence in the record on that point, all of which was introduced by appellee. This is not all. It was copied from the judgment of the appellee and does not purport to be founded on any evidence. It is from his judgment, which is presumed to be conclusions of law, and which was presumed to be correct and sustained by evidence.

Now the very point disclosed by this so-called statement of facts show that if it was admitted as a whole it is not sufficient under the law to set a deed aside on the ground of fraud. Suppose it is true that this deed was made to obstruct this appellee in the collection of his said claim, and these parties tried to hinder and delay him and to obstruct him, and appellee have a mortgage lien on the property? It is simply impossible under the law to do it. That appellee is compelled to go to court to foreclose is no obstruction to

him nor delay, and he can't claim he is damaged for that When appellee goes there all he has to do is to bring in all parties and close them out, and he is through. But suppose the mortgagee begins like he has here, with a piecemeal foreclosure and refuses to bring in the parties? Then colludes with the mortgagor to defraud the grantees and refuses to issue execution against the mortgagor. Where can be found his right in equity to set a grantee's deed aside whom he proves by his own evidence has paid $11,500 for the property he received and received a warranty deed therefor? (See R. P. 29, where consideration is proved.)

This is not all. The Court below has changed the theory of the appellee bill. Appellee sued on the alleged contracts of assumption and took five judgments on them. He sued for conspiracy and alleged his additional damages to be $1,000 as a lump sum against all (see R. P. and 6.) The Court below throws the appellee down on his suit to recover on the alleged contracts of assumption, and disregarded him altogether, refused to let him have it, and changed his suit for damages to a creditor's bill to set a deed aside on the grounds of fraud (see R. P. 5 and 6.)

They do not for once find Johns paid nothing for his deed. On the contrary, they prove he paid a valuable consideration for the property.

They do not find that Johns participated in the so-called fraud of his grantor.

Since it is necessary to follow the will-o'-the-wisp rulings of the Court below and since it is thrust upon the appellants to relieve themselves therefrom, it becomes necessary to resort to the laws of Arizona and compare the findings with that law and the bill to ascertain whether the findings under the law of fraudulent conveyances even wil sustain the judgment.

Rev. Stat. A. T., Par. 3031, Sec. 2, is, to-wit: "Every gift, conveyance, assignment or transfer of or charge upon any estate, real or personal, any suit commenced or decree, judgment or execution suffered or obtained, and any bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for a valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor."

Rev. Stat. Par. 2032, Sec. 3, is to-wit: "Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this territory subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent conditions, and though it be decreed to be void as to prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

Rev. Stat. of Arizona, Par. 2037, Sec. 8, is to-wit: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground of that it was not founded on a valuable consideration."

These three sections is all the law controlling fraudulent conveyances in Arizona.

An analysis of Par. 2031 shows that (aside from the exception) two things must happen and concur, else it is impossible for fraud to be committed under that Par. 1st the grantor in the conveyance must have creditors, purchaser or other person to be defrauded or wronged. Is R. E. Daggs a debtor of James Wilson? No. Has he any contract with James Wilson? No. When R. E Daggs purchased of John S. Armstrong he paid as the warranty deed that passed and in the record shows the full consideration for the property purchased, and received a warranty deed with covenants to warrant and defend the property against all claims and especially the claim of appellee. R. E. Daggs was not a debtor of the mortgagor. Suppose the mortgagor should bring suit to enforce the so-called contract of assumption in this warranty deed and show (supposing that he could) that R. E. Daggs had assumed and agreed to pay the claim of appellee, what would happen? R. E. Daggs would plead that the mortgagor had received full consideration for the property and had warranted the title against all claims. The deed under seal would prevail, together with the proof that the full consideration had been paid. This would render the so-called contract of assumption a mere nudum pactum unenforceable by the mortgagor. He would then have no contract he could enforce. How could the mortgagee reach an asset of the mortgagor unless the mortgagor had an asset to react? How could the mortgagee enforce a contract the mortgagor who made it and from whom the considera-

tion flowed could not enforce? Where does this mortgagee's right come in? R. E. Daggs is not then the debtor of either the mortgagor here or the mortgagee. So that feature of the law fails.

The second is the fraudulent intent of the debtor. R. E. Daggs not being a debtor of either the mortgagor or mortgagee they are not in a position under the law to complain of his pretended frauds. It is simply none of their concern.

3. Under the exception of the paragraph a search of the record shows (R. P. 29) that R. E. Daggs received a valuable consideration from A. L. Johns for the property. This was proved by the appellee's own testimony and stands uncontradicted and unimpeached. It appears then that the purchaser, A. L. Johns, paid a valuable consideration and unless it appear that A. L. Johns had notice of the fraudulent intent of R. E. Daggs, his immediate grantor, and participated in it, there is no ground or crevice for the law to set his deed aside. It is not found by the Court below that Johns participated in the so-called fraud of R. E. Daggs and for the very best reason, that there never was any fraud.

Now, then, as to Par. 2032 of the law, the contention of the appellee totally and absolutely fails. The reasoning applied to R. E. Daggs not being a debtor of John S. Armstrong and in no wise a debtor of James Wilson, applies with equal force to A. L. Johns as to Johns being a debtor of R. E. Daggs and a debtor of James Wilson. He is not a debtor. He owes the mortgagee nothing nor R. E. Daggs. Hence under this section the appellee must fail.

Under Par. 2032 if it is contended that the contention here falls within the terms of that paragraph. Then we say this record shows that R. E. Daggs has an abundance of property right here in Maricopa County, Arizona (see R. P. 68), where R. E. Daggs swears that on the 26th day of A. D., 1895, he owned and possessed more than 490 acres of land and other property and is perfectly responsible for any contract he would make or judgment that might be given against him. This fact is not disputed or denied by appellee anywhere in this record.

It is therefore clear that under neither of these paragraphs, 2031 or 2032, can the appellee sustain his contention as against R. E. Daggs. He committed no fraud when he sold his property to Mr. Johns.

It will be seen from Par. 2037 in addition to both of the former sections that two things must appear: First, a fraud-

ulent intent, which is made a fact, so that must appear by evidence; second, and the paper must be without consideration.

It would there appear that before the appellee can obtain or this judgment sustained it must be shown: First, that R. E. Daggs is a debtor. Appellee has no judgment against him (see R. P. 45). He has no contract with him wherein he can enforce and get a judgment. Appellee is no creditor of R. E. Daggs. Appellee then has nothing to do with his frauds. R. E. Daggs has done nothing wrong. It is bosh to say so.

Now then in order to set the deed from R. E. Daggs to A. L. Johns aside on the grounds that it hinders, delays or obstructs James Wilson, it must affirmatively appear by the finding of facts.

First: That R. E. Daggs is a debtor of James Wilson.

Second: That R. E. Daggs is insolvent.

Third: That the deed from Daggs to Johns was made with a fraudulent intent to defraud James Wilson.

Fourth: That it was without consideration. These things must happen and concur under the laws of Arizona before a deed can be set aside.

Fifth: In addition to this, says the law, if it appear, as it does here, that the purchaser paid a valuable consideration then the deed cannot be set aside unless it be further shown that the grantee knew of and participatd in the fraudulent intent of his immediate grantor.

Conceding, for argument, that on th fierst proposition R. E. Daggs by the statement is found to be a debtor of James Wilson, and the statement of fact finds this:

Second: It is not found that R. E. Daggs is insolvent. What is to prevent a solvent person from giving his property away promiscuously, so long as he keep enough to pay his debts? Paragraph 2032 as to prior creditors says if it appear that the debtor has property then to pay his existing debts. R. E. Daggs had 490 acres and other property, so appellee fails as to that, and the statement of facts totally fails to find that R. E. Daggs is insolvent.

Third: As to the fraudulent intent, if a man's solvent concede that the copy from the judgment is sufficient to show a fraudulent intent, how could this effect the appellee? It is absurd to say he could be in any way injured; hence this is of no avail.

Fourth: It is not found that the deed from R. E. Daggs to A. L. Johns is or was without consideration. On the contrary the record shows it was proved by the evidence to be for a valuable consideration. R. E. Daggs actually receiving the full consideration from A. L. Johns. Appellee then fails on this point.

Fifth. It being then in the evidence that a valuable consideration was paid the grantee then must have known of and participated in the fraudulent intent of R. E. Daggs and this fact also must be found before the deed from Daggs to Johns can b est aside. This fact is not found. None exists.

The conclusion then reached under the law quoted is that the finding of extracts of the opinion and judgment and conclusions and falsehoods fails to find three necessary ingredients essential to setting the deed from R. E. Daggs to A. L. Johns aside.Therefore the so-called statement of facts does not sustain the judgment. This statement of facts is unfair. It refuses to state the record as the record is.

The intent to defraud must not only be found to exist on the part of the grantor, but that intent must be found also to have been participated in by the grantee.

Rev. Stat. A. T., Par. 2031 Supra.

Gotlieb vs. Thatcher, 151 U. S. 271.

Curry et al, assignees, vs. Floyd, 22 Fed. 258.

Grinsky vs. Parlin, 42 Pac. 575.

In Priest vs. Brown, 35 Pac. 325, the Court said: "Where one party conveys land to another for a valuable and adequate consideration the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors if the grantee had no knowledge of such intent and was in no way a participant in the fraudulent purpose."

Johns is not found to have participated in the fraudulent intent. Neither is it found there was no consideration for his deed. The findings of opinion, complaint, judgment and false statements and conclusions of law will not sustain the judgment. The appellee's complaint, judgment and findings of facts abound in, hinder, delay, obstruct, defraud, conspiring, combining, fraudulent, defrauding, fraud, etc.

In Van Weel vs. Winston, 115 U. S. 228, the Court said: "Mere words in and of themselves and even qualifying adjectives of more specific charges are not sufficient

grounds of equity jurisdiction unless the transactions to which they refer are such as in their essential nature constitute a fraud or breach of trust, for which a Court of Chancery can give relief."

Ambler vs. Choteau, 107 U. S. 586-590.

Again, how can the Court below refuse to state the facts that the evidence proved by the appellee shows and in its stead copy the opinion and complaint pad this copied matter with statement that never existed in fact and never was intimated in the evidence, and couple this with conclusions of law and pass this bogus concoction as the ultimate propositions deduced from the evidence upon which the rights of the parties under the law rests?

Again, what legal right does the Court below possess to strike down the complaint of appellee on his suit wherein he sues appellant Johns on the so-called contract of assumption and says Johns is his debtor and his suit for $1,000 additional damages and thereby change the entire theory of appellee case and substitute therefor a creditor's bill seeking to remove an obstruction from the collection of a judgment when no judgment exists against R. E. Daggs (see R. P. 45, that no judgment exists against R. E. Daggs) and John S. Armstrong is not before the Court.

The Court below changed the entire theory of the appellee complaint mixture. The Court below selected a theory that did not exist and one that would be the most injurious to the appellants. Johns' legal right to redeem from the sale is stricken down. He must go out empty handed after appellee proves he paid in full for the property.

There is no theory of equity or law by which this judgment can be permitted to stand. There is no theory known to the code or any other system of administrative justice that countenances the character of proceedings here.

A creditor's bill cannot be maintained under such allegations as this bill presents. The pleader never supposed he was filing a creditor's bill. The subject of a creditor's bill was never thought of. A creditor's bill dragged out of the reforeclosure of a mortgage is absurd. That upon the allegation of appellee bill that these appellants should assume and agree to pay his demand and thereby seek to defraud him is preposterous and absurd in the extreme. The pleader never presumed he was carrying such a bill. The Court below presumed it for him as they presumed the judgment correct and the evidence sustained it.

What then is there for this Court to do in this case but to revert these parties to the contracts they made hemselves, as we have heretofore suggested? The mortgagor should not be allowed to escape his contract and reap the profits thereof. The mortgagee should be compelled to pursue him. He agreed and warranted this property against all claims and took from his grantee the money to pay this claim with. He is worth over $300,000 in the jurisdiction of the Court below and appellee refuses to pursue him, but colludes with him. The appellee has no contract with the grantees of the mortgagors and has no right to pursue them or set their deeds aside and bring havoc and slaughter to them and cause a multiplicity of endless litigation to no advantage of appellee unless he can get $15,000 worth of property for his alleged claim of $6,500. They bought and paid for the property once and they should be protected in their transactions made and consummated in perfect good faith, as this record shows. Why should they be slaughtered? Upon this plan the appellee will not lose, but get his claim, if claim he has. The mortgagor will be compelled to pay it as by his contract he agreed to pay it, and this collusive suit between the mortgagor and appellee be frustrated, and every one connected with this transaction be compelled to follow the contract.

Appellants then ask the Honorable Court to accept and follow this plan and thereby do no injury to any one in law or fact, but do right and dismiss this suit.

Respectfully submitted.

A. J. DAGGS,

Attorney for Appellants.

No. 67

Brief for Appellee

Filed Oct. 29, 1900.

Supreme Court of the United States

OCTOBER TERM, A. D. 1900

NO. 67.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS and A. J. DAGGS, *Appellants,*

vs.

JAMES WILSON, *Appellee.*

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

NO. 67.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS and A. J. DAGGS, *Appellants*,
vs.
JAMES WILSON, *Appellee.*

Appeal from the Supreme Court of Arizona.

BRIEF FOR APPELLEE.

In April, 1893, the appellee, James Wilson, being the owner of the premises in controversy, sold and conveyed the same to John S. Armstrong, and for the payment of the balance of the purchase money Armstrong made and executed his two promissory notes in the sum of $3,250 each, dated April 24, 1893, and to secure the payment of

said notes executed a mortgage on the said premises, which said mortgage was duly filed of record May 1, 1893. (Tr., pp. 50–53.)

On the 18th day of December, 1893, Armstrong sold and conveyed his interest in the premises to R. E. Daggs. Daggs, in and by said conveyance, assumed and agreed to pay the two promissory notes executed by Armstrong and secured by mortgage on the premises. (Tr., p. 35.)

The first of said notes not being paid at maturity, and there being a provision in the mortgage that in case default should be made in any of the conditions of said mortgage, then and in such case the whole principal sum should become due and payable. An action was commenced in the District Court of Maricopa County on the 26th day of April, 1894, by *James Wilson vs. John S. Armstrong and Robert E. Daggs* to foreclose the mortgage. (Tr., p. 39.) Summons was duly served on Armstrong on the 26th day of April, 1894, and on Daggs on the 27th day of April, 1894. (Tr., p. 44.) Also, on the 26th day of April, 1894, notice of *lis pendens* was filed in the office of the county recorder. (Tr., p. 141.) After service of summons and after the filing of notice of *lis pendens*, and on the 28th day of April, 1894, A. J. Johns filed for record a deed purporting to convey the premises in question from R. E. Daggs to himself. (Tr., p. 142.) The case proceeded to judgment against Armstrong and Daggs, a decree of foreclosure was ordered and the property sold for the full amount of the judgment. (Tr., pp. 45–55.) At the time of the commencement of the action on April 26th, appellee had no knowledge or information whatsoever that any person had any claim to said premises except Armstrong and Daggs. (Tr., p. 142.) No

redemption having been made from the sale of June 6, 1894, the sheriff on the 12th day of December, 1894, executed a deed of conveyance for the premises to appellee; demand of possession was then made under that deed from W. A. Daggs, then in possession, and he refused to surrender the same and claimed that he was then the tenant of A. L. Johns, although at the time of the commencement of the action against Armstrong and R. E. Daggs, W. A. Daggs was in possession of the premises for R. E. Daggs. (Tr., p. 141.) This would seem to be the first actual notice that appellee had that Johns claimed any interest in the premises.

On the 22nd day of June, 1895, appellee filed his complaint against the appellants, setting up the facts of the execution of the notes by Armstrong the assumption of their payment by Daggs, that on March 17, 1894, Daggs executed a deed to A. L. Johns, that the same was withheld from record until April 28, 1894, that in said deed Johns assumed and agreed to pay the Armstrong notes and mortgage, that W. A. Daggs was in possession as tenant of R. E. Daggs; that W. A. Daggs and A. J. Daggs conspired together with R. E. Daggs and A. L. Johns in making the deed to Johns for the purpose of hindering, obstructing and delaying and defrauding the appellee. The complainant asks that a foreclosure may be had and that appellees' mortgage may be adjudged to be wholly unpaid and unsatisfied, and for a judgment against the appellants on the mortgage and for $1,000 damages. Upon the hearing judgment was rendered in March, 1897, setting aside the sale had under the forclosure suit of *Wilson vs. Armstrong and Daggs*, and ordering a sale of the premises as against R. E. Daggs and A. L. Johns who had assumed and agreed to pay the mortgage debt, declaring the mort-

gage a lien upon the premises, also finding that appellants had fraudulently conspired together to cheat, wrong and defraud the appellee; and declarlng the deed of Daggs to Johns to be fraudulent and void, this judgment provided that the judgment in the case of *Wilson vs. Armstrong and R. E. Daggs* should stand and that writ of execution issue thereon and ordering sale of premises to satisfy the full amount due on the notes and mortgage. (Tr., p. 56). A sale of the premises was ordered under this judgment in both cases on the 10th day of April, 1897. (Tr., p. 71). And bid in by appellee for the sum of $2,000, leaving a deficiency decree of $6,861.26. (Tr., p. 74.) The Supreme Court affirmed this judgment, except as to the deficiency against Johns. (Tr., p. 112).

On the facts as they appear in the record there can be no question about the fraud and conspiracy in the Daggs-Johns deal. On pages 26 to 33 appears the evidence in full of R. E. Daggs, the chief actor in the matter. He testifies that W. A. Daggs was then in possession of the premises in question for the London Company, that he was first in possession for him, R. E. Daggs, afterwards in possession for A. L. Johns and had continued in possession right along for the owner of the land, and when Johns conveyed the land to the London Company that W. A. Daggs continued to act as agent for that company. He then testified that the London Company was incorporated by A. J. Daggs as president and himself as secretary, also that the London Company paid A. L. Johns $10,000 in stock for the premises in question. He also testifies that Johns paid him $1,150 on March 17, 1894 for the same premises, and that he received his pay in cattle and a lot of notes and accounts which Johns turned over to him, and this witness described

in detail what these notes and accounts were, also that 2,000 head of sheep was received from Johns in part payment. A. L. John testifies that he purchased the land from R. E. Daggs through his agent, A. J. Daggs, and paid the purchase money, $2,450, when he received the deed, March 17, 1894. He also testifies that he sold the premises back to A. J. Daggs, for the sum of $2,600; and received his pay all in cash. (Tr., pp. 146-147). "I informed A. J. Daggs that his money was ready for him when he delivered me the deed, and on March 17, 1894, I paid him $2,550 in cash and took the deeds, also his receipt for the money in full." Comment is unnecessary when such testimony as this, together with other facts, and circumstances are produced before the trial court on the question of fraud.

In the opinion of the Supreme Court of the Territory the court refer to errors assigned so there must have been some errors assigned in that court, but the record does not disclose what the errors assigned were, except that on a petition for a rehearing certain errors are referred to as having been assigned which are difficult to understand.

The errors noticed and passed upon by the lower court are four in number, (Tr., p. 110):

First. That the grantees of the original mortgagor were not liable to a direct action by the mortgagee because no privity of contract was shown in the pleading, and the action not being brought in the name and for the benefit of the mortgagor.

Second. That the former judgment is conclusive against the parties to the action, and the plaintiff having one judgment cannot bring a second suit.

Third. That the plaintiff has made a misake of law and the court has no jurisdiction to grant relief.

Fourth. That the court rendered a personal judgment against defendant Johns for full amount of the debt after having adjudged his deed of conveyance to be fraudulent and void.

The appellants bring the record into this court and assign a long list of errors for the consideration of this court; whether they are the same as were assigned in the court below does not appear.

No notice can be taken of errors unless they were properly assigned in the appellate court; appellants will not be permitted to present assignment of errors here which were not presented in the court below.

Lichtenstandt vs. Rose, 98 Ill., 643.
Thayer vs. Peck. 93 Ill., 357.

This court is only called upon to pass upon such errors as were assigned upon the record before it, and the judgment of the appellate court cannot be impeached for failure to sustain an error that was not assigned.

Hanson vs. Miller, 145 Ill., 538.

And so a judgment for costs against appellant not assigned for error in the appellate court cannot be urged for the first time in this court.

Hyslop vs. French, 99 Ill., 171.

The 4th assignment of error having been sustained by the Territorial Court, A. L. Johns has nothing to complain of except the setting aside of his deed. In no other respect has he been injured. His complaint about that is not that the facts do not justify it, but that some other form of action should have been brought for that purpose.

It was not necessary to have made Johns a party to the first foreclosure proceedings at all. He having filed his deed after notice of *lis pendens*, and after the service of summons on his grantor, he was therefore bound by that proceeding on judgment of foreclosure to the same extent as if made a party to the suit.

Am. & Eng. Enc. of Law, Vol. 13, 907.
Wilstie on Mortgage Foreclosure, p. 371.

As an incident to the proceeding to foreclose the rights of Johns in the premises, a decree was made declaring his deed fraudulent and void, and decreeing a sale of the premises as against R. E. Daggs.

It was not necessary to make Armstrong, the mortgagor, a party to that second proceeding, his rights had already been disposed of in the first foreclosure.

Benedict vs. Gilman, 4, page 58.
Morey vs. City of Duluth, 71 N. W., 694.

The Supreme Court of the Territory have found the facts relied on for the hearing of the case. (Tr., p. 140).

Respectfully submitted.

D. H. PINNEY and
LOUIS T. ORR,
Attorneys for Appellee.

Supreme Court of the United States.

No. 67.—October Term, 1900.

Alvin L. Johns et al., Appellants, vs. James Wilson. } Appeal from the Supreme Court of the Territory of Arizona.

[March 11, 1901.]

This was a complaint, in the nature of a bill in equity, under the Arizona code, filed in the district court of Maricopa County, by the appellee, Wilson, (who had already, in a prior suit, foreclosed a mortgage upon certain real estate against John M. Armstrong, mortgagor, and Robert E. Daggs, purchaser of the premises,) against Alvin L. Johns, subsequent purchaser *pendente lite* of the same premises, and also against William A. Daggs, tenant in possession, Robert E. Daggs, his landlord, and A. Jackson Daggs, agent of Robert E., to charge Johns and Robert E. Daggs with the payment of the mortgage debt, for a foreclosure of the mortgage against all the defendants, for a receiver and for a judgment against all for damages.

The complaint, which was filed June 22, 1895, alleged that when the former bill foreclosing the mortgage was filed, April 26, 1894, John M. Armstrong, the mortgagor, and Robert E. Daggs, who purchased the premises December 18, 1893, were the only parties known to the plaintiff to be liable upon the notes, or to have any interest whatever in the mortgaged property; but that the defendants Robert E. Daggs and A. Jackson Daggs, conspiring together to hinder and obstruct the plaintiff in the collection of his mortgage debt, procured a deed of conveyance of the property from Robert E. Daggs to Johns for the sole purpose of hindering, delaying and obstructing him in the collection of his mortgage debt; that the deed, though dated March 17, 1894, before the proceedings for a foreclosure were begun, was withheld from record until April 28, 1894, after the summons in the foreclosure action had been served, and after the *lis pendens* had been filed; that in this deed Johns expressly agreed and bound himself to pay the plaintiff's mortgage debt; that William A. Daggs, who was at the time of the foreclosure in possession as tenant of Robert E. Daggs, did not advise plaintiff of his surrender of the premises as tenant of Robert E. Daggs, or of his having taken possession as the tenant of Johns; and that such abandonment and release of the property, and the taking possession thereof as tenant of Johns, were done secretly, without any notice to the plaintiff, with intent to deceive him into the belief that he (William A.) was still holding possession as tenant of Robert E. Daggs, and that the plaintiff, on account of such secret transfer of possession, if any was made, was

deceived, as the defendant intended him to be, and that the foreclosure action therefore proceeded to judgment without his joining or making the said Johns and William A. Daggs defendants therein; that plaintiff had no knowledge or information, when he began his action and filed his *lis pendens*, that any other persons than Robert E. Daggs had any claim to the premises. Wherefore plaintiff prayed for a judgment against Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, for the amount of such debt, and for the sum of one thousand dollars as damages; that his mortgage be adjudged unpaid and unsatisfied, and that the same be foreclosed against all the defendants and all persons holding under them, and for such further relief as the circumstances of the case required.

On a hearing upon pleadings and proof a judgment was rendered setting aside the sale had in the foreclosure suit of *Wilson* v. *Armstrong and Daggs*, and the satisfaction of the judgment made upon such sale; that the plaintiff Wilson recover of Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, the amount of such debt, declaring such amount ($8,541.13) to be a lien upon the property, which was also foreclosed; ordering a sale of the premises as against Robert E. Daggs and Johns, and also finding that appellants had fraudulently conspired together to cheat, wrong and defraud the appellee, and declaring the deed of Daggs to Johns to be fraudulent and void. It was further ordered that the former judgment stand and be carried into effect by a resale of the property, and in case the proceeds be insufficient to pay the judgment, that the sheriff make the deficiency out of the other property of Robert E. Daggs and Johns. The property was subsequently sold and bid in by the appellee for $2,000, leaving a deficiency of $6,861.26. There was no decree for damages.

An appeal was taken to the Supreme Court of Arizona, which modified the action of the lower court by omitting therefrom the personal judgment against Johns for the deficiency, but otherwise affirming it, (53 Pac. Rep. 583,) and, upon an appeal being taken to this court, made the findings of fact set forth in the margin.*

Mr. Justice Brown delivered the opinion of the Court.

This case involves the right of a mortgagee to relief against one who secretly purchased the premises just prior to a bill being filed for the fore-

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* *Finding of Facts.*

1. That on the 24th day of April, 1893, one John S. Armstrong executed a mortgage on certain real estate, described in the complaint herein, to one James Wilson to secure the payment of two certain promissory notes in said complaint set forth, each being for the sum of $3,250.00 and interest, and dated on said 24th day of April, 1893.

2. That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant (appellant here) R. E. Daggs, and con-

closure of the mortgage, and who withheld his deed from record until after the summons in the foreclosure suit had been served, and a *lis pendens* had been filed.

At the time the original foreclosure suit was begun, the defendant William A. Daggs was in possession of the premises, and the title, so far as disclosed by the record, then appeared to be in Robert E. Daggs. But after it had culminated in a sale of the premises, June 6, 1894, and the sheriff had executed his deed December 12, 1894, William A. refused to surrender possession, and claimed to hold as the tenant of Johns, and from that time continued to hold as such tenant, to the exclusion of plaintiff.

The Supreme Court found as a fact that the defendants Robert E. and A. Jackson Daggs had conspired together to hinder and obstruct Wilson in the collection of his mortgage debt, and to that end procured the deed from Robert E. Daggs to Johns, and withheld it from record until after the foreclosure suit had been begun; that such deed was fraudulent and void as against Wilson, and was executed and recorded by Robert E.

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veyed the same by certain deed of conveyance, in which said defendant R. E. Daggs agreed and bound himself, his heirs, executors and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

3. That on the 26th day of April, 1894, default having been made in the payment of the said notes secured by said mortgage, the said Wilson commenced an action in the district court of Maricopa County against the said Armstrong and said R. E. Daggs for the recovery of the amount due upon said notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder of said county.

4. That at the time of the beginning of said suit the defendant W. A. Daggs was in the possession of the said premises, and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

5. That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the 8th day of May, 1894, against the said defendants J. S. Armstrong and R. E. Daggs, for the full amount due, with costs, and for the foreclosure of the mortgage.

6. That thereafter and on the 6th day of June, 1894, the said premises were sold by the sheriff of Maricopa County under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said sheriff, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs, then being found in possession, refused to surrender the same and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and

Daggs for the purpose of hindering and delaying the plaintiff in securing possession of the mortgaged premises, and of obtaining satisfaction of his judgment by process of law.

A large number of errors are separately assigned by the different defendants, but we shall notice only such as were passed upon by the Supreme Court or pressed upon our attention in the briefs.

1. The most important is that Robert E. Daggs, the grantee of the original mortgagor, was not liable in a direct action by the mortgagee, because no privity of contract was shown between such grantee and the plaintiff mortgagee; and the action was not brought in the name of, or for the benefit of, the mortgagor Armstrong.

This assignment should be read in connection with the second finding, which is in substance that, in December, 1893, Armstrong sold to the

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occupy said premises and property as such tenant of A. L. Johns, to the total exclusion of plaintiff James Wilson.

7. That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action and the filing of the *lis pendens* aforesaid, a deed was placed on record in the office of the county recorder of said county, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns, of Chicago, Illinois.

That at the time the demand for possession, as aforesaid, was made by said Wilson upon the defendant W. A. Daggs, said W. A. Daggs claimed and asserted that on the first day of April, 1894, he ceased to be the tenant of R. E. Daggs and therenpon became the tenant of said A. L. Johns, and took possession of said property for said Johns at said time, and from that time forward held possession of said premises as the tenant of said A. L. Johns and not as the tenant of said R. E. Daggs.

8. That at the time of the commencement of said action to foreclose said mortgage the said plaintiff in said action, James Wilson, had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim to said premises.

9. That said defendants R. E. Daggs and A. J. Daggs did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs and for the purpose of hindering, delaying and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.

defendant Robert E. Daggs the premises previously mortgaged to Wilson, the appellee, and conveyed the same to him by deed, in which Daggs agreed and bound himself to pay the two notes executed by Armstrong and secured by the mortgage. Under this sale and transfer Daggs entered into possession of the premises by William A. Daggs, his tenant. There was also in the deed of March 17, 1894, from Robert E. Daggs to Alvin L. Johns, as appears from a copy of the deed sent up with the record, a similar agreement by Johns to assume and pay the Wilson mortgage; but as the Supreme Court held this deed to be fraudulent and void, and that there could be no recovery upon the agreement against Johns, this deed becomes immaterial. The question is, whether there can be a personal judgment against Daggs upon the agreement in *his* deed from Armstrong to pay this mortgage. In the first decree rendered in the suit of *Wilson* v. *Armstrong and Robert E. Daggs*, there was a personal judgment against Armstrong upon the notes, which the mortgage was given to secure, and an order for a foreclosure and sale of the premises; and in case the proceeds of the sale were insufficient to satisfy the judgment, the sheriff should make the balance out of any other property of the defendant Armstrong; but there was no personal judgment against Robert E. Daggs. Such judgment was prayed for and granted in this case.

The question whether a mortgagee can recover against the grantee of the mortgager upon a stipulation in his deed from the mortgagor to assume and pay off the mortgage, as well as the more general question how far a third party may avail himself of a promise made by the defendant to another party, has been the subject of much discussion and difference of opinion in the courts of the several States, but we think the decisions of this court have practically removed it from the domain of controversy.

In *National Bank* v. *Grand Lodge*, (98 U. S. 123,) the Masonic Hall Association, a Missouri corporation, had issued a large number of bonds which the Grand Lodge had assumed by resolution to pay. The bank brought an action at law against the Grand Lodge to compel the payment of certain coupons attached to these bonds, of which it was the holder, and this court held that it was not entitled to recover, upon the ground that the holders of the bonds were no parties to the resolution, and there was no privity of contract between them and the Lodge. In delivering the opinion of the court, Mr. Justice Strong observed: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or

under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise."

Keller v. *Ashford* (133 U. S. 610) was a bill in equity by Keller, the mortgagee, against Ashford, the grantee of the land subject to this mortgage, which he had agreed to pay. It was held after full examination of the authorities, first, that the mortgagee could not sue at law, citing *National Bank* v. *Grand Lodge*, (98 U. S. 123,) and *Cragin* v. *Lovell*, (109 U. S. 194); second, that in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee; but, third, that under the equitable doctrine that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, the mortgagee was entitled to avail himself of an agreement in a deed of conveyance from the mortgagor, by which the grantee promised to pay the mortgage. This is upon the theory that the purchaser of land subject to the mortgage becomes the principal debtor, and the liability of the vendor, as between the parties, is that of surety.

In *Willard* v. *Wood*, (135 U. S. 309,) in error to the Supreme Court of the District of Columbia, it was held that the question whether the remedy of the mortgagee against the grantee of the mortgagor to enforce an agreement contained in the deed to him to pay the mortgage debt, be at law or in equity, was governed by the *lex fori*, and that in the District of Columbia such remedy was by bill in equity only.

In *Union Life Ins. Co.* v. *Hanford*, (143 U. S. 187,) it was said to be "the settled law of this court, that the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt." The court restated the rule laid down in *Willard* v. *Wood*, (135 U. S. 309,) that the question of the remedy of the mortgagee, whether at law or in equity, was to be decided by the law of the place where the suit was brought. The material question in that case was whether the giving of time to the grantee, without the assent of the grantor, discharged the latter from personal liability. It was held that it did, citing *Shepherd* v. *May*, (115 U. S. 505.)

As, however, under the Arizona code, there is no distinction between suits at law and in equity, we see no reason to doubt that this action will lie. Indeed, in *Williams* v. *Naftzger*, (103 Cal. 438,) the Supreme Court of California, whose code was practically adopted by the legislature of Arizona, thought an agreement on the part of the grantee to pay and dis-

charge a mortgage debt upon the granted premises, for which his grantor was liable, renders the grantee liable therefor to the mortgagee; and in an action for a foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency, citing *Keller* v. *Ashford*, (133 U. S. 622.)

2. Further objection is made to this proceeding upon the ground that it is not shown that the mortgagor "had been exhausted," or that he is insolvent. If by this is meant that, after the sale of the property, the mortgagee is bound primarily to proceed against the mortgagor personally for any deficiency, the position is inconsistent with the doctrine of the cases above cited, in which it is assumed that the purchaser, who has agreed to pay the mortgage, is the principal debtor, and the mortgagor is surety. This view is thus concisely stated by Mr. Justice Gray in *Union Life Ins. Co.* v. *Hanford*, (143 U. S. 187, 190): "The grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and grantor toward the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt." Undoubtedly the mortgaged property must first be applied to the payment of the debt. This was done. The judgment, though nominally against Daggs for the amount of the mortgage debt, contemplated in subsequent paragraphs that the sheriff should only make the balance out of the property of the defendant Daggs, in case the proceeds of the sale were insufficient to pay the judgment. This, too, was the language of the order of sale.

In the case of *Biddell* v. *Brizzolara*, (64 Cal. 354,) relied upon by the appellants, the general principle was recognized that, where a purchaser of real estate from the mortgagor assumes payment of the mortgage debt, a cause of action arises, upon the principle of subrogation, in favor of the mortgagee, which he may enforce at any time within the life of his mortgage by a suit against the purchaser. In that case, however, it was held there could be no recovery, because the statute of limitations had run against the mortgage debt, and because the purchaser had reconveyed the mortgaged property to the mortgagor prior to the commencement of the action. As Armstrong could have recovered against Robert E. Daggs any deficiency he had been obliged to pay, the plaintiff could proceed against Daggs directly for such deficiency.

It is true that William A. Daggs was not made a party to the prior foreclosure bill, but his only claim to the property was that of tenant, either of Robert E. Daggs or of Johns. Robert E. Daggs was made a party to that bill, and Johns is made a party to this. We fail to see how either of them is prejudiced by William A. Daggs not being made a party to the former bill.

3. The seventh assignment, that no reason is shown for not applying for relief in the former foreclosure suit, appears to be based upon the theory that the former judgment is conclusive against the parties to the action, and that the plaintiff has no legal right to a second foreclosure. While it is true that, if the plaintiff had sought to foreclose the right of William A. Daggs to this property, he should have been made a party to the former foreclosure, it is difficult to see how Johns would have been affected by a decree against Daggs, unless he also had been made a party. That he was not made such party is explained by the fact that his deed had not been put upon record, and that it was impossible for the plaintiff to have known, from aught that appeared to him, that Johns was the owner of the property. Where the mortgagee has no knowledge and no means of knowing that the mortgaged property has been sold by the person in whose name it stands of record, especially where such sale is brought about by a fraudulent conspiracy between the vendor and vendee, and the conveyance is withheld from record for the purpose of misleading the mortgagee, we know of no objection to a second foreclosure for the purpose of terminating the rights of the vendee. As stated in Jones on Mortgages, section 1679: "If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the cost of the previous sale." (*Bank* v. *Abbott*, 20 Wis. 570; *Stackpole* v. *Robbins*, 47 Barb. 212; *Shirk* v. *Andrews*, 92 Ind. 509; *Brackett* v. *Banegas*, 116 Cal. 278; *Morey* v. *City of Duluth*, 69 Minn. 5; *Benedict* v. *Gilman*, 4 Paige, 58; *Georgia R. R. Co.* v. *Walker*, 61 Miss. 481.)

While it is possible that the mortgagee might have been able to obtain relief by an amended bill in the original suit, a new action is a proper remedy where he has been mistaken in his facts, especially if such mistake has been brought about by the contrivance of the legal owners. Appellants apparently proceed upon the assumption that the possession of William A. Daggs was not only notice of his own rights to the property, and of his tenancy under Robert E. Daggs, the record owner, but also of the ownership of Johns, whose title did not appear of record, and of which the mortgagee had no actual notice. We cannot acquiesce in this assumption. It is true that plaintiff asserts in his complaint that, two days after his original bill of foreclosure was filed, William A. Daggs "claimed and asserted" (to whom is not stated) that he had abandoned the premises as tenant of Robert E. Daggs to become the tenant of Johns. Under such circumstances, the plaintiff, if he knew of it, should have at once filed an amended bill; but his failure to do so does not seem to have resulted to the prejudice of any of the defendants, nor can it be said that plaintiff has lost his rights, except to the costs of the first suit, by failing to do so. An amended or supplemental bill is rather an alternative than an only remedy, and a

failure to pursue this course ought not to debar him from resorting to another bill. (*White* v. *Secor*, 58 Ia. 533; *Botineau* v. *Ætna Life Ins. Co.* 31 Minn. 125; *Rogers* v. *Benton*, 39 Minn. 39; *Foster* v. *Johnson*, 44 Minn. 290; *Stackpole* v. *Robbins*, 48 N. Y. 665; *Moulton* v. *Cornish*, 138 N. Y. 133; *Dodge* v. *Omaha &c. R. R. Co.*, 20 Neb. 276.)

Defendants also claim a misjoinder of causes of action, in that the plaintiff sues Daggs not only for a breach of his contract of assumption of the notes set out in the complaint, and to foreclose the mortgage lien, but upon an alleged conspiracy, wherein he charges him with colluding with A. Jackson Daggs to withhold the deed to Johns from record, and prays damages in the sum of one thousand dollars for a refusal to surrender possession. As there was no recovery, however, upon this claim, we think it has become immaterial to consider whether there was a misjoinder. The same comment may be made upon the alleged misjoinder of parties.

We have examined the remaining assignments of error, of which there are a large number, contained in appellants' brief, and find them to turn upon questions of facts or as to the admission or rejection of testimony, which are foreclosed by the findings of the Supreme Court, or upon the alleged defects in procedure, which were not deemed to be of sufficient importance to be noticed in the opinion of that court. We find in none of them any sound reason for disturbing this judgment, and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.